EDITOR'S NOTE

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(12)

No. 84-978-ASX
Status: GRANTED

Title: Exxon Corporation, et al., Appellants
v.
Robert Hunt, Administrator of New Jersey Spill Compensation Fund, et al.

Docketed:
December 17, 1984

Court: Supreme Court of New Jersey

Counsel for appellant: Carlin Jr., John J.

Counsel for appellee: Jacobsen, Mary C.

Entry	Date	Note	Proceedings and Orders
1	Dec 17 1984	G	Statement as to jurisdiction filed.
3	Jan 14 1985		Order extending time to file response to jurisdictional statement until February 1, 1985.
4	Feb 1 1985		Motion of appellees Hunt, Admnr., NJ Spill Comp. Fd. to dismiss or affirm filed.
5	Feb 6 1985		DISTRIBUTED. February 22, 1985
6	Feb 12 1985	X	Reply brief of appellants Exxon Corp., et al. filed.
7	Feb 25 1985	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Powell DUT.
8	May 24 1985		Brief amicus curiae of United States filed.
9	May 28 1985		RELISTED. June 13, 1985
10	Jun 6 1985	X	Supplemental brief of appellants Exxon Corporation, et al. filed.
11	Jun 17 1985		PROBABLE JURISDICTION NOTED.
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12	Aug 1 1985		Lodging received. (3 copies).
13	Aug 1 1985		Joint appendix filed.
14	Aug 1 1985		Brief of appellants Exxon Corp., et al. filed.
16	Aug 24 1985		Order extending time to file brief of appellee on the merits until September 26, 1985.
18	Aug 23 1985		Order extending time to file brief of appellee on the merits until September 26, 1985.
19	Sep 10 1985		Record filed.
21	Sep 25 1985		Brief amicus curiae of United States filed.
22	Sep 25 1985		Brief amicus curiae of California filed.
23	Sep 25 1985		Brief of appellees Hunt, Admnr., NJ Spill, et al. filed.
24	Oct 18 1985		CIRCULATED.
25	Oct 22 1985		SET FOR ARGUMENT, Monday, December 9, 1985. (4th case).
26	Nov 26 1985	X	Reply brief of appellants Exxon Corp., et al. filed.
27	Dec 9 1985		ARGUED.

APP

No. 84-978

IN THE

Supreme Court of the United States

OCTOBER 1984 TERM,

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Appellants,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation, JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,

Appellees.

Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT—STATE CIVIL CASE

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether the taxing provisions of the New Jersey Spill Compensation and Control Act, N.J.S. 58:10-23.11 *et seq.* are preempted by The Comprehensive Environmental Response Compensation and Liability Act of 1980 (Superfund), 42 U.S.C. § 9601 *et seq.* and, therefore, the imposition of them is in violation of the Supremacy Clause of the United States Constitution?

2. Whether the Supreme Court of New Jersey disregarded the plain and recent mandate of this Court in *Aloha Airlines v. Director of Taxation of Hawaii,* 104 S. Ct. 291 (1983), when it nullified an explicit preemption provision of Superfund by formulating a contrary Congressional purpose from legislative history? *

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* The names of all of the parties to this proceeding in the Court below are included in the caption of these pleadings. The listing of parent companies, subsidiaries (except wholly owned) and affiliates are set forth in the Appendix attached hereto at page 1a.

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Appellants,

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Appellees.

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the New Jersey Tax Court entered on April 23, 1982, the opinion of the Superior Court of New Jersey, Appellate Division, entered on June 22, 1983, and the opinion of the Supreme Court of New Jersey, entered on September 19, 1984, are set out in the Appendix hereto. The decision of the Tax Court is reported at 4 N.J. Tax 294 (Tax Ct. 1982); the decision of the Superior Court, Appellate Division is reported at 190 N.J. Super. 131 (App. Div. 1983). The decision of the New Jersey Supreme Court is reported at 97 N.J. 526 (1984).

Jurisdiction in this Court

This suit challenges the constitutionality of the taxing provisions of the New Jersey Spill Compensation and Control Act, N.J.S. 58:10-23.11 *et seq.* on the basis that such provisions are expressly preempted by § 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (Superfund), and, therefore, in violation of the Supremacy Clause of the United States Constitution.

The federal constitutional question involved in this suit has continuously been raised by appellants in all proceedings. The New Jersey Tax Court entered a decision upholding the constitutionality of the New Jersey Act on the basis that § 114(c) of Superfund did not preempt the New Jersey Tax. This decision was affirmed by the New Jersey Appellate Division and New Jersey Supreme Court.

Notice of appeal to this Court was timely filed on November 19, 1984.

The jurisdiction of the United States Supreme Court to review the decision of the Supreme Court of New Jersey on appeal is conferred by 28 U.S.C. § 1257(2). *Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 104 S. Ct. 291, 294 (1983); and *Arizona Public Service Co. v. Snead,* 441 U.S. 141, 146 (1979) support the jurisdiction of the Supreme Court to review the judgment on appeal in this case.

Constitutional and Statutory Provisions Involved

The Supremacy Clause of the United States Constitution, Article VI, C1. 2, provides as follows:

> This Constitution and the Laws of the United Stat es which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §9601, *et seq.*, is set out in full in the Appendix hereto. Section 114(c) of Superfund, 42 U.S.C. §9614(c) provides as follows:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparation for the response to a release of hazardous substances which affects such State.

The New Jersey Spill Compensation and Control Act, N.J.S. 58:10-23.11, *et seq.*, is set out in pertinent part in the Appendix hereto.

Statement of the Case

On December 11, 1980, in response to an increasing awareness of the damages caused by the release of hazardous substances into the environment, Congress enacted "Superfund," 42 U.S.C. §9601 *et seq.* The national response effort was to be addressed by the federal government in cooperation with the states. It was to be financed on the federal level by a $1.6 billion trust fund, eighty-seven and one-half percent of which was to be raised by a feedstock tax imposed on crude oil and petroleum products and on certain chemicals. It was understood at the time that while a feedstock tax was not the most equitable assessment available to fund hazardous waste identification and clean-up, it was the easiest to administer since it involved collection from only approximately 1,000 taxpayers instead of an estimated 260,000 if the fund were financed by a tax placed on generators of hazardous waste. S. Rep. No. 848, 96th Cong., 2d. Sess. 20 (1980).

Under Superfund's financing scheme, the States were required to pay only a 10% matching share of clean-up costs for

remedial action (unless they were responsible for the waste site). In return for the flow of funds collected under the federal taxing scheme to the States, the States were expressly precluded by §114(c) of Superfund, 42 U.S.C. §9614(c), from taxing any person to cover claims, costs or damages which "may be compensated" under the federal Act. Section 114(c) goes on to state, however, that "[n]othing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparation for the response to a release of hazardous substances which affects such State."

Since the mid-1970's, the State of New Jersey has had in effect a Spill Compensation and Control Act. N.J.S. 58:10-23.11 *et seq.* (New Jersey Act). The New Jersey Act prohibits the discharge of petroleum and other hazardous substances in the State of New Jersey and, in addition, provides for the clean-up and removal of such discharges, the establishment of a Spill Compensation Fund, and the raising of revenue therefor by the levy upon each and every operator of a major facility in New Jersey of a barrel tax involving chemical and petroleum products.

From the inception of the New Jersey Fund until June, 1981, 93% of the revenues collected totaling $31,000,000 was spent on claims relating to clean-up and containment of hazardous substances other than petroleum. Clean-up of petroleum-related sites constituted less than 1% of expenditures.

Since the enactment of Superfund, clean-up of petroleum-related spills has continued to constitute less than 1% of the expenditures from the New Jersey fund. Expenditures for equipment have constituted less than 2% of the fund. Expenditures by the State on just two sites which are listed on the Superfund National Priority List total $12,000,000 out of $18,000,000 expended. This information is contained in discovery material furnished by New Jersey.

Thus, the statutory provisions at issue in this case require operators of major facilities, including plaintiffs, to contribute to a fund, the principal purpose of which is to pay compensation of

claims for the costs of response or damages or claims which "may be compensated" under the federal law.

As early as 1976, the New Jersey legislature anticipated that the New Jersey Act would have to be incorporated into a federal scheme of hazardous substance clean-up and containment once a national plan was formulated. The legislature, therefore, included the following provision in the New Jersey Act:

> If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the Commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendation to the legislature for amendments to this act. N.J.S. 58:10-23.11z.

To date, New Jersey has not complied with this directive. If it chose, New Jersey could have amended the Spill Fund to cover only non-preempted items and adjusted the tax rate accordingly.

A complaint in this suit was initially filed by plaintiffs in the United States District Court, which dismissed plaintiffs' suit based on the Tax Injunction Act, 28 U.S.C. §1341. The Third Circuit Court of Appeals affirmed the jurisdictional decision of the District Court on the basis that plaintiffs' claim did not "arise under" federal law and the United States Supreme Court denied plaintiffs' Petition for Certiorari. *Exxon Corp. v. Hunt*, 683 F.2d69 (3d Cir. 1982), *cert. denied*, 439 U.S. 1104 (1983).

On August 10, 1981, plaintiffs filed a complaint in the Tax Court of New Jersey. On cross motions for summary judgment, the Tax Court, on April 23, 1982, granted the State defendants' motion and dismissed all but two counts of plaintiffs' complaint. The remaining two counts, which do not involve any question of the constitutionality of the State statute, were severed from the rest of the case for purposes of appeal and the decision of the Tax Court was appealed to the Appellate Division on May 7, 1982. This appeal was consolidated with an appeal by the plaintiffs of the regulations of the New Jersey Department of Treasury governing expenditures under the New Jersey Act. On

June 22, 1983, the Appellate Division rendered an opinion affirming the judgment of the Tax Court below with regard to the taxing provisions of the New Jersey Act, but invalidating the Treasury Department regulations on procedural grounds. Plaintiffs filed a Petition for Certification with the New Jersey Supreme Court on July 2, 1983. On September 19, 1984, the Supreme Court of New Jersey affirmed the judgment of the Tax and Appellate Courts.

The conclusion of the Courts below was that "[t]he Spill Fund tax imposed on plaintiffs is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous waste cleanup costs and related claims that are either not covered or not actually paid under Superfund. The underlying intent of Superfund, as well as the legislative history, mandates a conclusion of *no preemption.*" *Exxon Corp. v. Hunt,* 97 N.J. 526, 544 (1984). (emphasis added) The crux of these opinions is an interpretation of the pivotal language "may be compensated" in §114(c) of Superfund, which the Courts below concluded should be read as "has been compensated." This rewriting substitutes the concept of actual compensation for that of compensability. It is justified by the Courts as required to effectuate the true legislative intent behind §114(c) and thereby avoid New Jersey's dire predictions and speculations as to shortfalls in Superfund's coverage.

During the pendency of these lawsuits, plaintiffs have continued to pay into the New Jersey Spill Fund in accordance with its terms. From January, 1981 through June, 1982, plaintiffs paid approximately $5,759,000 into the New Jersey Fund. The total of payments to date is in excess of $9,000,000. Refund claims have been filed by the plaintiffs, but they have been denied by New Jersey unless a court ruling invalidating the Spill Fund Tax is obtained.

Substantiality of the Questions Presented

This appeal presents a substantial question of national public importance, involving the application of the Supremacy

Clause of the United States Constitution to a direct conflict between federal and state law.

The instant case has, as its context, one of the most significant environmental issues today, the identification and clean-up of hazardous waste. The specific issue on appeal involves the critical question of the funding sources of such identification and clean-up. Plaintiffs allege that the taxing provisions of the New Jersey Spill Compensation and Control Act violate the express taxing proscriptions of §114(c) of Superfund, thereby thwarting the objectives of Congress in enacting the federal statute.

This court has long recognized the principle that where a state statute is in violation of a federal statute which has preempted the field or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Supremacy Clause of the United States Constitution, Article VI, clause 2, mandates that the State statute must fall. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 104 S. Ct. 291, 294 (1983); *Maryland v. Louisiana,* 451 U.S. 725, 746-47 (1981); *Arizona Public Service Co. v. Snead,* 441 U.S. 141, 146 (1979). Preemption in a field has been compelled by the Supreme Court "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purposes." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Even if Congress has not foreclosed the field, state statutes have consistently been held to be void to the extent of actual conflict with federal statutes. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978).

In the present case, all that is required to determine that preemption exists is to compare the federal and state statutes. Doing so, it is obvious that the New Jersey Spill Tax, as now constituted, directly conflicts with the express terms of §114(c) of Superfund, since it requires the plaintiff taxpayers to contribute to a fund, the essential and principal purpose of which is, indisputably, to pay compensation for claims and costs which may be compensated under Superfund. It follows, therefore, that preemption doctrine as enunicated by this Court mandates that the State statute must fall.

This conclusion is not avoided by citation to case law which directs a narrow construction of preemption language wherever possible. When a federal statute expressly preempts State regulation and then authorizes narrow exceptions from such preemption, attempts at State regulation must fall within these authorized exceptions. *Exxon Corp. v. City of New York*, 548 F.2d 1088, 1094 n.10 (2d Cir. 1977); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973). In this instance, New Jersey is restricted to taxing Superfund taxpayers only for those authorized exemptions to preemption set forth in the second sentence of §114(c).

Instead of following the long-standing preemption doctrine developed by this Court, recently set forth in *Aloha Airlines*, the New Jersey courts below have ignored legal mandates and decided this case on policy grounds, narrowing the scope of preemption under §114(c) of Superfund into literal nonexistence. In so doing, the State courts violated several established principles of statutory construction.

A fundamental rule of statutory construction looks to the language of the statute itself, and requires that if the statutory language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject, there is no leeway for judicial interpretation as to legislative intent. In such instance, the court need only interpret the statute according to its terms. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 104 S. Ct. 291, 294 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 429-30 (4th Cir. 1971).

In § 114(c) of Superfund, Congress has expressly preempted States from imposing special taxes on a limited class of persons for the purpose of covering any "claims which may be compensated under" Superfund and has limited States to "using general revenues for such a fund" or to "imposing a tax or fee . . . to finance the purchase or prepositioning of hazardous substance response equipment" and the like. The New Jersey Supreme Court, pursuing the principle that "there is no surer

way to misread any document [including a statute] than to read it literally," thus "direct[ed] [its] attention to the meaning of § 114(c) in the context of the supportive provisions of Superfund and the legislative background of the whole of Superfund" and ultimately held that § 114(c) does not mean what it says.

This approach to resolving the preemption issue raised here ignores this Court's holding last term in *Aloha Airlines v. Director of Taxation*[1], 104 S. Ct. 291 (1983). In striking down Hawaii's tax on airline gross receipts as preempted by "the plain language of 49 U.S.C. § 1513(a)," this Court characterized the Hawaii Supreme Court's approach as "looking beyond the language of § 1513(a) to Congress's purpose in enacting the statute." 104 S. Ct. at 294. The Court condemned this technique for avoiding federal preemption where Congress has expressly preempted state law:

> We cannot agree with the Hawaii Supreme Court's analysis. First, when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.[2] Thus, the Hawaii Supreme Court erred in failing to give effect to the plain meaning of § 1513(a).
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> . . . .
>
> The Hawaii Supreme Court apparently considered itself obliged by *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and its progeny to examine thoroughly Congress's intention before declaring Haw. Rev. Stat. § 239-6 preempted. *In re Aloha Airlines, Inc.*, 65 Haw. 1, 13-16, 647 P.2d 263, 272-273 (1982). *Rice* and its progeny, however, involved the implicit preemption of state statutes. Rules developed in these cases apply when a court must decide whether a state law should be preempted even though Congress has not expressly legislated preemption. These rules, therefore, have little application when a court confronts a federal statute like § 1513(a) that explicitly preempts state laws. 104 S. Ct. at 294. (footnote 6 omitted).

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[1] *Aloha* was not decided when this case was first briefed. It was called to the New Jersey Supreme Court's attention by letter memorandum prior to oral argument, but was not acknowledged in that court's opinion.

[2] The relationship between this federal statute and the Hawaii legislation in *Aloha* is comparable to the relationship between the federal and state laws here at issue. The 1970 Airport & Airway Development Act imposed, *inter alia*, an 8% federal tax on domestic airline tickets, which was used to establish a "Trust Fund to finance federal resources to local airport expansion and

The New Jersey Supreme Court has similarly refused to respect the plain meaning of an explicit preemption provision of federal law. This disregard for settled principles used in resolving preemption issues, standing alone, merits review of the lower court's decision.

This "plain meaning" rule further requires that the words of a statute are to be given their ordinary meaning unless a different use is clearly indicated. Only if there is substantial unambiguous evidence supporting a contrary interpretation is it necessary to look beyond the words of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Matula v. Consolidation Coal Co.*, 647 F.2d 427, 430 (4th Cir. 1971).

The meaning of §114(c) of Superfund is clear on its face; it is directed toward eliminating double taxation for the same purposes as Superfund and is not directed toward eliminating duplicative spending for the same costs as Superfund. Congress did not refer to claims which are, in fact, compensated under Superfund, but rather those which may be compensated under Superfund. This choice of language by Congress cannot be ignored. The phrase "may be compensated" was used by Congress instead of "has been compensated" or "is compensated" for the very reason that its plain and inherent meaning connotes possibility. See *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973); *John Reiner & Co. v. United States*, 325 F.2d 438, 441 (Ct. Claims 1963), *cert. denied*, 377 U.S. 931 (1964).

Despite the above, the courts below found that "[t]he seemingly simple, but often misused and misapplied word 'may' is anything but unambiguous. The word 'may' is often subject to differing meanings when used in statutory construction." *Exxon Corp. v. Hunt*, 4 N.J. Tax at 297, *cited with approval at*, 97 N.J. at 534. As the sole authority for this conclusion regarding the

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improvement projects." To avoid a double tax burden on the airline industry, subsequent amendments provided that "no state . . . shall levy or collect a tax . . . on persons travelling in air commerce . . . ." 104 S. Ct. at 292. Hawaii sought to escape the preemptive effect of the federal statute by reading the federal statute as only preempting a tax on air carriers, not air passengers.

ambiguous nature of the word 'may,' the opinions below relied upon a line of cases involving the delegation of ministerial power to a public official. *E.g., Kraft v. Board of Educ. of Distr. of Columbia*, 247 F. Supp. 21, 24-25 (D.D.C. 1965), *cert. denied*, 386 U.S. 958 (1967). Such a factual context is entirely absent from the instant matter, which involves the use of the words "may be." "May be," in the context of §114(c), connotes the *possibility* (as opposed to the actuality) of compensation and does not reach the consideration of permissiveness at all.

Even more obviously, the interpretation of §114(c) adopted by the courts below violates a second fundamental rule of statutory construction, requiring that effect must be given, if possible, to every word, clause or sentence of a statute. That is, a statute must be construed so that no part of it is made inoperative, redundant or superfluous. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Palmeri*, 630 F.2d 192, 199 (3rd Cir. 1980), *cert. denied*, 450 U.S. 967 (1981), *cert. denied sub nom., Carlello v. United States*, 450 U.S. 983 (1981).

The holding of the New Jersey Supreme Court as to the scope of preemption under §114(c) was that "[t]he Spill Tax imposed on plaintiffs is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous waste clean-up costs and related claims that are either not covered *or not actually paid* under Superfund." *Exxon Corp. v. Hunt*, 97 N.J. at 544 (emphasis added). That is, the New Jersey Supreme Court interpreted §114(c) as providing that plaintiffs cannot be taxed for costs already paid by the federal fund. As long as the State restrains itself from paying clean-up costs and related claims *already paid* by the federal government, it may use its industry-financed fund for any purpose it so chooses.

It is respectfully submitted that such a holding as to the scope of preemption under §114(c) amounts to absolutely no preemption at all and, therefore, renders the provision meaningless, a clearly improper result. It presupposes that Congress enacted §114(c) to preclude solely the possibility that a State would pay on claims already compensated by Superfund. This would hardly require a specific and express statutory provision.

In addition, §114(c) addresses itself to *taxing*, not spending. The spending of monies from a state fund to award duplicate compensation is directly addressed in §114(b). To reduce clause (c) of §114 to a total redundancy of clause (b) cannot be presumed to have been the intention of Congress in enacting that provision.

The decisions of the courts below also nullify any congressional intent in drafting the second sentence of §114(c), which provides:

> [N]othing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

42 U.S.C. §9614(c).

If the State is permitted to continue to collect an industry tax for all purposes, with the only limitation being payments on claims *already paid* under Superfund, there would be absolutely no purpose in providing for the use of general revenues for a separate State clean-up fund, unless Congress intended to permit such a fund to be used to pay for bills already paid on the federal level. Such a construction renders the second sentence of §114(c) absolutely meaningless or ludicrous.

Finally, the courts below made inappropriate and misleading use of the legislative history of Superfund in an attempt to bolster the State's construction of §114(c).

When confronted with a statute which is plain and unambiguous on its face, courts do not look to legislative history as a guide to its meaning. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978). The language and meaning of §114(c) of Superfund are clear and evince the intention of Congress to prevent duplicative taxation of the petroleum and chemical industries by the prohibition against State industry-supported funds whose *purposes* are covered by Superfund. Plaintiffs submit that concluding that the meaning of §114(c) of Superfund is clear and unambiguous obviates the necessity of

searching legislative history to divine congressional intent. Creation of an ambiguity in an otherwise clear and unambiguous statute by reference to legislative history is improper. *Matala v. Consolidation Coal Co.*, 647 F.2d at 430.

Nevertheless, the legislative history surrounding the passage of Superfund in whole supports, rather than negates, plaintiffs' claim that taxation under the New Jersey Act is preempted by the Superfund legislation. Superfund was a compromise measure passed during the closing sessions of the 96th Congress. The compromise was achieved on the basis of four predecessor bills. In the House, there were two separate bills: H.R. 7020, 96th Cong. 2d Sess. (1980), which covered only inactive waste sites, and H.R. 85, 96th Cong. 2d Sess. (1980), which covered spills of oil and hazardous wastes into navigable waters. H.R. 7020 did not contain any preemption provisions. H.R. 85 contained preemption clauses in §110 and §302 of that bill. From the remarks of its sponsor, it is clear that the purpose of the clauses was to prevent a state from imposing a tax or fee on oil or other hazardous substances if the tax or fee was to go into a fund, the purpose of which was to pay claims compensable under the Act. 125 Cong. Rec. 384-87 (1979).

In the Senate, there were also two earlier versions of Superfund S. Rep. 1341, 96th Cong. 2d Sess. (1980), which was sponsored by the Administration, preempted the States from requiring a person to contribute to any fund the purpose of which was to pay compensation for a claim which may be asserted under the Act. S. Rep. 1480, 96th Cong. 2d Sess. (1980) originally did not involve a feedstock tax and contained no preemption language. Amendments were introduced to it on September 24, 1980. The written explanation for the amendments containing the preemption language was that it was to prevent states from establishing their own overlapping and duplicative systems and to make S. 1480 consistent with H.R. 85 and S. 1341. 126 Cong. Rec. 27,086 (1980). It specifically stated:

> This amendment provides that claims may be asserted under this act (other than claims relating to closed hazardous waste disposal

facilities) may not be asserted under other laws and that the states are preempted from establishing funds or imposing financial responsibility requirements for such claims. The amendment would expressly not prevent the states from providing remedies for damages not covered by S. 1480. In addition, states would specifically retain their authority to impose taxes or fees for the purchase of cleanup equipment. This amendment is consistent with both S. 1341, the administration's proposal, and H.R. 85, the House companion bill which passed the House on September 19, 1980.

126 Cong. Rec. 27, 086 (1980).

When the final version was passed in the Senate, the vast majority of the remarks of the Senators support the contentions of the Appellants. See 126 Cong. Rec. 30,930-87 (1980).

When the House passed the Senate version of the bill, Representative Florio made it clear that his understanding of the extent of the preemption language in §114(c) was that "... States may not create duplicate funds to pay damages compensable under this bill. . . ." 126 Cong. Rec. 31,965 (1980).

Ignoring all the above-cited legislative history, the New Jersey Courts instead chose to excerpt a few sentences from the remarks of Senators Bradley and Randolph, out of context, in order to support their conclusion, *Exxon Corp. v. Hunt*, 97 N.J. at 538-39. In addition, the New Jersey Supreme Court improperly resorted to the use of legislative history created almost four years later on a bill that was never enacted. *Id.* at 539-46. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) (condemning reliance on such *post hoc* "legislative history.") The court compounded this error by also relying on a self-serving EPA March 1982 memorandum, which at best can be described as ambiguous. [9] Certainly, the

[9] In *New Jersey v. United States*, 16 E.R.C. 1846, 1849 (D.D.C. 1981), the Court held in November 1981 that EPA had "taken no position on the scope of § 114(c)," and observed that it did "not even have in place an administrative mechanism for forming an authoritative position on the section." The court went on to observe that "there has been no delegation of power from the President to any agency to enforce the section." *Id.*

guidance memorandum, insofar as it attempts to interpret the question of federal preemption of state taxation, touches upon an area beyond the expertise of the EPA, and beyond the authority delegated to it under Superfund, and would in no way be controlling on the courts or entitled to the deference given it by the Supreme Court of New Jersey. *See, General Electric Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976). Moreover, even when an agency has such authority, its vacillations concerning the meaning of the statute undermine the deference which courts might give to the Agency's most recent interpretation of the statute. *Secretary of the Interior v. California*, 104 S. Ct. 656, 660-61 n.6 (1984).

In enacting Superfund, Congress embarked the fifty states upon a five year experiment in a national response to hazardous waste clean-up and containment. For this five year period, the federal government, through the EPA, with substantial state participation and input, undertook a leadership role in cleaning up those sites across the nation which pose the greatest danger to the health and safety of American citizens, and to coordinate remedial and removal efforts at such sites. To achieve this goal, Congress included in Superfund's comprehensive liberal response authority a site identification program, a response funding mechanism and a range of enforcement tools and cost recovery measures.

The judgment of Congress in structuring Superfund was that the most efficient and economical means of financing such a national effort would be through a 1.6 billion dollar federal fund, financed primarily by a federal feedstock tax levied upon the petroleum and chemical industries, and supplemented by voluntary cleanups by industry, negotiated settlements with responsible parties and enforcement suit recoveries against legally responsible parties. In exchange for eligibility to receive federally-collected industry tax dollars to finance 90% of the cost of remedial site cleanup, and 100% of the financing in the case of removal activity, states were precluded, for Superfund's five year duration, from taxing those same industries for the same purposes as the federal government is taxing them.

Superfund is very clear as to the scope of its preemption. It expressly *does not* preempt States from exercising their power to clean up hazardous waste left unaddressed by Superfund. The sole effect of §114(c) is to remove one specific source of revenue to finance state clean-up activities in return for Superfund financing. Section 114(c) leaves to States the option to finance Superfund-eligible, but not actually compensated, expenditures out of general revenues, bonding programs or any other means. In fact, New Jersey has done this by authorizing a $100 million bond issue in 1981, specifically to provide for the costs of clean-up and removal of hazardous discharge, either not eligible for clean-up under the New Jersey Act or for which monies available under the New Jersey Act are insufficient. None of this money has yet been expended, however. Instead, New Jersey has continued to expend Spill Fund revenues on Superfund sites.

It is evident that the real thrust of the New Jersey Courts' consideration of the preemption issue was their fear that literal compliance with Congress' mandate in §114(c) would jeopardize hazardous waste clean-up in the State. As discussed above, this is an unwarranted conclusion. It is respectfully submitted, however, that it is also irrelevant to this case. The issue as to who should fund hazardous waste clean-up, and in what proportions, was debated and resolved in the Congress of the United States. It was the final determination of Congress that the responsibility of the petro-chemical industry in regard to hazardous waste clean-up efforts should be limited to contributing 87.5% of the $1.6 billion federal Fund. Additional taxation of this specific group of taxpayers for the same purposes by any other taxing authority was specifically prohibited by §114(c) because Congress determined that it would place too much of a burden on the industry and interfere not only with interstate commerce, but with the country's balance of trade.

The New Jersey Courts considered the preemption issue only as it related to New Jersey. In enacting Superfund, Congress was concerned with the financing of clean-up activity in all 50 states, and how it would affect national corporations whose facilities would now be paying spill taxes nationwide. This

broader perspective on the problem, and concern for its national ramifications, must be respected and upheld, not ignored. It is not for a state court to rewrite a statute to comport with its judgment of what the court might consider a wiser course.

The New Jersey courts may well have felt that federal and state hazardous waste clean-ups were best integrated in a way other than as set forth in §114(c) of Superfund. However, as recently as *Aloha Airlines*, the Court has rejected such reasoning. 104 S. Ct. at 294, n.6. It is for Congress, not the courts, to change the scope of preemption under Superfund. If evidence is presented in the appropriate legislative forum of the need for double taxation, Congress, as it reviews Superfund reauthorization this year, can remove or modify preemption. Until then, courts must interpret and enforce the legislature's will as written. *Id.* at 16, n.10.

New Jersey is the sole forum in which a determination is being pursued. Given the national ramifications of the New Jersey Supreme Court decision on the issue of preemption, this case should be reviewed by this Court at a full plenary hearing.

CONCLUSION

The decision of the New Jersey Supreme Court below upholding the taxing provisions of the New Jersey Superior Court and Court of Appeals should be summarily reversed on the basis of this Court's holding in *Aloha Airlines v. Director of Taxation* or, in the alternative, this Appeal should be accorded plenary review.

Respectfully submitted,

FARRELL, CURTIS, CARLIN & DAVIDSON

By _____

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APPENDIX

APPENDIX A

In accordance with the requirements of Rule 28.1 of the United States Supreme Court Rules, the following is a listing naming the parent companies, subsidiaries and affiliates of Petitioner Corporations:

EXXON CORPORATION

The subsidiaries and affiliates (except wholly owned) of Exxon Corporation are:

Abu Dhabi Petroleum Company Limited
Abu Dhabi Company for Onshore Oil Operations
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit besohrankter Haftung
Aishin Sekiyu K.K.
Aktiebolaget Svensk Petroleumadministration
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
A/S Futurum
A/S Hydrantanlaegget Kobenhavns Lufthaven, Kastrup
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Assistance Services S.A.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdgasleitung G.m.b.H.

BSB Gewerkschaften Brigitta und Elwerath
Betriebafuhrunggesellschaft m.b.H.
Bel-Air Entreposage S.A.
BTAS, Inc.
Building Products of Canada Limited
Byron Creek Collieries Limited
Byron Creek Collieries (1983) Limited
Canada Wide Mines Ltd.
Carnduff Gas Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Cia Refinadora Petrola Santo Domingo, Inc.
Colmant Cuvelier Dodge S.A.
Colmar Suriname Oil Company, Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S.A.
Compania Minera Disputada de Las Condeo S.A.
Comptoir Auxiliaire du Petrole
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Daitsu Sangyo K.K.
Delta Hope & Twine Limited
Depot Petrolier du Grosivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Det Gronlandske Olieaktieselskab
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dodge de Mexico S.A. de C.V.
Drivmedelecentralen Aktiebolag
Dukhan Service Company
86129 Canada Ltd.
E S F Limited

Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Ejendomsaktieselskebet ef 12. juni 1964
Eiwerath Erdol und Erdgas AG
Emirates Oilfield Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C.A.
Esso Chimie
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Italiana S.p.A.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
European Gas & Electric Company
Exact Reisebyra A/S
Excess and Treaty Reinsurance Corporation
446259 Ontario Limited
FPE South Africa (Proprietary) Limited
F.T. Giken Kabushiki Kaisha
Federal Pacific Electric de Mexico S.A. de C.V.
Federal Pioneer Limited
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forenade Svenska Oljeimportorers AB
Forjan de Colombia, S.A.
Fuji Kogyo K.K.
Fuji Uuyu K.K.
Fukui Sekiyu K.K.
General Busaan K.K.
General Highway K.K.
General Petrochemical Industries Limited

General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brigitta
Gewerkschaft Elwerath
Gewerkschaft Elwerath & Co. GmbH.
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gilbarro do Brasil S.A.—Equipamentos
Goroku Sekiyu K.K.
Grande Escaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier du Finistere G.I.E.
Hankyu Ferry K.K.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokuyu Sekiyu K.K.
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industrias Reliance S.A. de C.V.
Intecom, Inc.
Interface Mechanisms Inc.
Internationale Gas Transport Maatschappij B.V.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Investment Promotion Enterprises Limited
Iranian Oil Participants Limited

Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shoshe
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Niimi Kirun
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S ejendomsseiskebet af 8, oktober 1965
K/S Hoje Taastrup Storcenter 11
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kyguna Sekiyu Hambai Kabushiki Kaisha
Kawasaki Naiko Kabushiki Kaisha
Keihin Kygnus Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kepco Mfg. Inc.
Kibo Sekiyu Hanbai K.K.
Kiinteisto Oy Myllynksllio
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha

Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LFL Investments, Inc.
La Compagnie Electrique Pioneer du Quebec, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzerisches Erdol
Les Dooks des Petroles d'Ambes
Les Restaurants Le Voyageur Inc.
Long Beach Oil Development Company
Magota Sekiyu K.K.
Magyar Amerikai Olajipari Reszvenytarsasag
Mainline Pipelines Limited
Makoto Sekiyu Kabushiki Kaisha
Maortgaz Ertekesito R.T.
Maple Leaf Petroleum Limited
Maquinas de Coser y Border Sigma, S.A.
Mars-Alcatel, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Mongeau & Robert Cie Ltee
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Moraine Properties Ltd.
95269 Canada Limited
Nakabayashi Sekiyu K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.

Near East Development Corporation
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
107580 Canada Inc.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.
P.T. Stonvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petrole Assistance Lyon (S.A.R.L.)
Petrole Assistance Marseille (S.A.)
Petrole Assistance Orleans (S.A.R.L.)
Petrole Assistance Paris T.R. (SA)
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company, Inc.
Petrosvibri S.A.

Pipeline Service
Pipe Line Service Company, Inc.
Pipeline Service Iran
Pipeline Service U.K.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Polyolefins Product Co. Pty. Ltd.
Portland Pipe Line Corporation
Potencia Industrial S.A.
Productos Lorain de Mexico S.A. de C.V.
Progas A/S
Qatar Petroleum Company Limited
Qualbank, Inc.
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S.A.
Reliance Electric & Engineering Company de Mexico S.A. de C.V.
Reliance Electric Limited
Reliance Electric Ltd.
Reliance Electric S.A. (Spain)
Renix Co. Ltd.
Renown Building Materials Limited
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevoia (SAPPRO)
S & M Pipeline Limited
S.O.P.—Societa Oleodotti Padani S.p.A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanwa Kasei Kogyo Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S.A.

Schubert KG
SEAG Aktiengesellschaft fur schweizerisches Erdol
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Skiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K. K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa per Azioni Raffineria Padana Olii Minerali—SARPOM
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar"—PROLUMA S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariesse
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation DakarYoff, S.A.

Societe de Promotion et de Financement Touristique (CARTHACO)
Societe d'Entrepoisage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Development d'Operations Commerciales
Societe du Ceoutohouc Butyl (SOCABU)
Societe du Depot Petrolier d'Hauconcourt
Societe du Parkings du Square Boucicaut
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe "Geomines-Caon"
Societe Harvaise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Compagne
Societe Immobiliere Paris-Niel
Societe Industrielle de Mecanique et d'Equipement Petrolier S.I.M.E.P. (S.A.R.L.)
Societe Italiana per l'Oleodotto Transalpino S.p.A.
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe du Pipeline Sud-Europeen
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologque de Gaz de Lavora
Suddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Suntech Company, Ltd.
Supertex, Inc.
Svensk Petroleumlagring Tre Aktiebolag
Syncrude Canada Ltd.

Synergistics Chemicals Limited
305120 Alberta Ltd.
346877 Ontario Limited
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellchaft Nurnberg mbH
Taihei Bussan K.K.
Taiko Skiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A.G., Mellingen
Tanklager Altishausen A.G.
Tanklager Gesellschaft
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I.S.A.
Tanklager Taegersohen AG
Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Tos Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tokai General Sekiyu Hanbai K.K.
Toko Sekiyu K.K.
Toledo Scale Company de Mexico S.A. de C.V.
Toledo Werk GmbH
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Seikyuksgaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K.K.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgaz Lavera

Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Ulupna Estates Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Pty. Ltd.
W.H. Adam, Ltee, Ltd.
Wako Jushi Kabushiki Kaisha
Wako Kaesi Kabushiki Kaisha
Westdeutche Erdolleitungs—G.m.b.H.
Westgas G.m.b.H.
Williamsport Properties Limited
Winnepeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke-Rodewald G.m.b.H.
Worex Distribution
Wrenford Insurance Company Ltd.
Yasaka Sekiyu, K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yusi Sekiyu K.K.
Yugan Kaisha Nishi Kobe Dosai Center

BFGOODRICH

Consolidated subsidiary companies of BFGoodrich Company with an ownership of less than 100%:

Bil Tech of California; BFGoodrich Australia Limited; BFGoodrich Chemical Limited; Industria Colombiana de Llantas, S.A.; E.P.P.C Polyplastic S.A.; BFGoodrich Chemical de Venezuela, C.A.

UNION CARBIDE CORPORATION

Union Carbide Corporation states that the United States subsidiaries, excluding wholly owned subsidiaries, and affiliates of Union Carbide are: ACM Services, Inc., Arizona Welding Equipment Co., Miami Welding Supply, Inc., United States Welding, Inc., V.B. Anderson Co. and VBA Cryogenics Corp.

The following are Union Carbide's foreign subsidiaries (except wholly-owned subsidiaries) and affiliates: Union Carbide Egypt S.A.E.; Union Carbide Ghana Limited; Union Carbide Kenya Limited; Union Carbide Nigeria Limited; Union Carbide Sudan Limited; Union Carbide Canada Limited; Chemos Industries Pty. Limited (Australia); Union Carbide Australia Limited; Union Carbide India Limited; P.T. Agrocarb Indonesia; Nippon Unicar Company Limited (Japan); Union Showa K.K. (Japan); Sony Eveready, Inc. (Japan); Union Gas Company Limited (Korea); Union Carbide Malaysia Sdn. Bhd.; Union Polymers Sdn. Bhd. (Malaysia); Union Carbide New Zealand Limited; Union Carbide Ceylon Limited (Republic of Sri Lanka); Indugas N.V. (Belgium); Calida Gas N.V. (Belgium); La Littorale S.A. (France); Argon, S.A. (Spain); Unifas Kemi A.B. (Sweden); Electro Manganes Ltda (Brazil); S.A. White Martins (Brazil): S.A. White Martins Nordeste (Brazil); Union Carbide Mexicana, S.A. de C.V. (Mexico); Electrode Maatskappy Van Suid Afrika (Eiendoms) Beperk (Republic of South Africa); Tubatse Ferrochrome (Proprietary) Limited (Republic of South Africa).

MONSANTO

Domestic and foreign subsidiaries and affiliates of Monsanto Company with an ownership of less than 100%:

Fisher Controls International, Inc.; Fisher Controls Limited; Monsanto (Malaysia) Sdn. Berhad (Monaysia); Nippon Fisher Company, Ltd.; Revertex Industries (N.Z.) Ltd.; ACM Services, Inc.; Agerquim, S.A. de C.V.; Australian Fluorine Chemicals Pty. Limited (A.F.C.); Collagen Corporation; Companhia Brasileira de Estireno (CBE); Daishin Kogyo K.K.; Goyana, S.A. Industrias Brasileiras de Materias Plasticas (GOYANA); Hydrocarbon Products Pty. Ltd. (HPPL); Industrias Resistol, S.A. (IRSA); K.K. Astro Gelande; Kirbi Kasei K.K.; Korag Company Limited; Mitsubishi Monsanto Chemical Company (MMK); Nippon Cooper Kabushiki Kaisha; Plagon S.A.—Plasticos Goyana Do Nordeste (PLAGON); Plax Canada Limited

[now 102975 Canada Limited]; Polyamide Intermediates Limited; Resimor Sinteticos do Nordeste S.A. (RESINOR); Rezinex Australia Limited; Ryonichi Nohken K.K.; Sankyo Kasei Sangyo K.K.; Soperton Gum Market, Inc.; Taiyo Kouyo Kabushiki Kaisha.

TENNECO

Tenneco Chemicals, Inc.'s name has been changed to Tenneco Resins, Inc. Tenneco Resins, Inc. is owned 100% by Tenneco Polymers, Inc., which is owned 100% by Tenneco Corporation, which is owned 100% by Tenneco Inc. which is the ultimate holding company. All of these companies are Delaware corporations. Tenneco Resins, Inc. has no subsidiaries. It does, however, have two affiliate companies, i.e., those which are also owned 100% by Tenneco Polymers, Inc. These are Heyden Newport Chemical Corporation (a Delaware corporation) and Tenneco Eastern Realty, Inc. (a New Jersey corporation).

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY, AND TENNECO CHEMICALS, INC., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY, SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, AND THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS.

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY, AND TENNECO CHEMICALS, INC., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY, SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION, AND THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS.

Argued January 23, 1984—Decided September 19, 1984

SYNOPSIS

Appeals were taken challenging declaratory judgment of the Tax Court, 4 N.J.Tax 294, determining the extent to which taxing provisions of the New Jersey Spill Fund and Compensation Act are preempted by federal law and the validity of certain regulations promulgated by the state treasurer under the Spill Fund Act. The Superior Court, Appellate Division, Antell,

J.A.D., 190 N.J.Super. 131, 462 A.2d 193, affirmed, and certification was granted. The Supreme Court, Clifford, J., held that tax instituted by the state to establish Spill Fund is not preempted by tax imposed by federal government to create Superfund insofar as Spill Fund is used to compensate hazardous waste cleanup costs and related claims that are either not covered or not actually paid under the Superfund.

Affirmed.

1. States ⇦4.10

An allegation of preemption must be analyzed with reference to whether federal statute expressly or by necessary implication indicates exclusivity, whether federal scheme is so pervasive that it precludes coexistence of state regulation, and whether state program stands as an obstacle to accomplishment and execution of full purposes and objectives of Congress.

2. Statutes ⇦223.1

Courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible.

3. Statutes ⇦223.1

In determining proper construction of allegedly conflicting statutes, courts must perform essentially a two-step process of first ascertaining construction of the two statutes and then determining constitutional question whether they are in conflict.

4. Statutes ⇦217.4

Reference to legislative history is appropriate not only where statutory language is ambiguous but also where literal interpretation would thwart overall statutory scheme.

5. States ⇦4.10

The tax instituted by the State of New Jersey to establish a Spill Fund to cover costs of environmental cleanup is not preempted by the tax imposed by the federal government to create the Superfund insofar as the Spill Fund is used to compensate hazardous waste cleanup costs and related claims that are either not covered or not actually paid under the Superfund. N.J.S.A. 58:10–23.11 to 58:10–23.11z; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101–308, 114(c), 42 U.S.C.A. §§ 9601–9657, 9614(c).

John J. Carlin, Jr., argued the cause for appellants (*Farrell, Curtis, Carlin & Davidson*, attorneys).

Mary C. Jacobson, Deputy Attorney General, argued the cause for respondents (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *Michael R. Cole*, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by

CLIFFORD, J.

In this case we consider one aspect of the staggering problems associated with the release of hazardous substances into our environment. Cleanup and removal efforts have been authorized by the State through the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10–23.11 to –23.11z (Spill Fund), and by the federal government pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 *U.S.C.A.* §§ 9601–9657 (Superfund). This appeal focuses on the taxing structures established by each of the foregoing Acts. More specifically, we address the issue of the constitutionality of Spill Fund—that is, whether the tax imposed by the federal government to create Superfund effectively preempts the tax instituted by the State of New Jersey to establish Spill Fund.

I

Plaintiffs are five petroleum and chemical companies that are currently paying taxes into both Spill Fund and Superfund. After several unsuccessful attempts to have the federal courts determine the scope of section 114(c) of Superfund, 42 *U.S.C.A.* § 9614(c) (see *Exxon Corp. v. Hunt*, 4 *N.J.Tax* 294, 299 n. 4 (1982), for a synopsis of those efforts), plaintiffs filed these consolidated actions challenging the constitutionality of Spill Fund in light of section 114(c) of Superfund. [1]

The parties filed cross-motions for summary judgment. Plaintiffs argued that the Spill Fund tax was preempted by section 114(c) of Superfund, which reads:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims *which may be compensated under this subchapter*. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State. [42 *U.S.C.A.* § 9614(c) (emphasis added).]

Plaintiffs maintained that the principal purpose of the state tax was to compensate hazardous-waste sites that might ultimately be compensated by Superfund, thereby contravening the above-emphasized language of section 114(c) of Superfund.

[1] Plaintiffs filed two complaints, one in the Tax Court and one in the Chancery Division. Both actions asserted that the tax imposed by Spill Fund was preempted by the provisions of Superfund. The complaints differed only in that the Chancery Division action sought additional relief that is not at issue here. On defendant's motion the Chancery Division action was transferred to and consolidated with the Tax Court action.

Defendants, describing Spill Fund as a constitutionally-valid supplement to Superfund, argued that Spill Fund was aimed at providing compensation for those claims that were not receiving Superfund coverage.

Judge Evers granted defendants' motion for summary judgment in the Tax Court. [2] 4 *N.J.Tax* 294. Relying on the legislative history surrounding the enactment of Superfund, as well as on the scope and purposes of both Superfund and Spill Fund, Judge Evers concluded that the Spill Fund tax was not preempted by Superfund.

> The court finds that Congress, through the adoption of [Superfund], has not put an end to the taxing powers of the states for hazardous substance cleanup, containment and remedial purposes by putting another tax in its place. Rather, the court finds that [Superfund] permits a state to continue to avail itself of industry tax funds with the obvious limitation that a double tax could not be collected and expended on any one project. Such would be the practicalities of government where both state and nation have the same and yet separate, identifiable interests. [*Id.* at 320.]

Moreover, Judge Evers alternatively held that even if Spill Fund Tax monies could not be collected for general containment and cleanup purposes, "the [S]pill [F]und law nevertheless encompasses many other areas to which such monies could be devoted which are clearly outside the reach of § 114(c) and which may very well be of sufficient magnitude to sustain the [S]pill [F]und tax." *Id.* at 315. Thus, the court held that "even if § 114(c) of [Superfund] could be construed to preempt part of [S]pill

[2] All but two counts of plaintiffs' consolidated complaints were dismissed. 4 *N.J.Tax* 294, 320 (1982). The remaining two counts were severed from the rest of the case for purposes of appeal.

[F]und, * * * nonpreempted areas [3] are more than sufficient to sustain its continued validity." *Id.* at 320 (footnote added).

On plaintiffs' appeal the Appellate Division affirmed, "substantially for the reasons stated by Judge Evers in his written opinion * * *." 190 *N.J.Super.* 131, 132–33 (1983). [4] We granted certification, 94 *N.J.* 607 (1983), to determine whether "the plain language of § 114(c) of Superfund preempt[s] the State of New Jersey from collecting taxes under the taxing provision of the [Spill Fund] as presently enacted", and now affirm.

II

Spill Fund was enacted in 1977, L.1976, c. 141, with the expressed legislative intent to

[3] The areas that Judge Evers found to be "non-preempted," and therefore eligible for Spill Fund compensation, included the following: the purchase and prepositioning of hazardous-response equipment; the cleanup of petroleum and crude oil spills; payment of third-party damage claims; and the Superfund provision that a state contribute ten percent or more of the costs of remedial action, including future maintenance, in order to qualify for federal funding (42 *U.S.C.A.* § 9604(c)(3)). 4 *N.J.Tax* at 316–17.

[4] During the time between the oral argument before Judge Evers and the rendering of his decision, the New Jersey Department of the Treasury published proposed regulations governing expenditures under Spill Fund. Plaintiffs submitted timely comments to these proposed regulations, but due to an error within the Department of the Treasury those comments were deemed to be "untimely and need not be considered." The regulations were thereafter adopted. Plaintiffs challeged the validity of the regulations by appeal to the Appellate Division. That appeal was subsequently consolidated with the appeal of Judge Evers' decision; and although the Appellate Division concluded that the Department of the Treasury had failed to comply with the Administrative Procedure Act and that the regulations were invalid and without force and effect, defendants have not sought review of that issue by the Court. We therefore restrict our attention to the issue of preemption as considered by Judge Evers.

> exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge. [*N.J.S.A.* 58:10–23.11a.]

This statute provides for the establishment of "a nonlapsing, revolving fund in the Department of the Treasury to carry out the purposes of this act." *N.J.S.A.* 58:10–23.11i. The fund's revenues are supplied by a tax "levied upon each owner or operator of one or more major facilities [5] * * * to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances * * *." *N.J.S.A.* 58:10–23-11h(a) (footnote added).

In December 1980 Superfund was enacted in response to escalating national hazardous-waste problems. Congress provided for the establishment of a $1.6 billion fund over a five-year period [6] for the cleanup and removal of pollution caused by the release of hazardous substances into the environment. Superfund imposes a tax to finance the federal fund, taxing chemical indus-

[5] A "major facility" is defined by the statute as including "any refinery, storage or transfer terminal, pipeline, deep water port, drilling platform or any appurtenance related to any of the preceding that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport hazardous substances." *N.J.S.A.* 58:10–23.11b(*l*). It is undisputed that each plaintiff operates a major facility. 4 *N.J.Tax* at 301 n. 5.

[6] Superfund is scheduled to expire in 1985. However, on August 10, 1984 the House of Representatives passed H.R. 5640, "Superfund Expansion and Protection Act of 1984," which provides for additional funding of $10.2 billion between 1985 and 1990. The bill, authored by Rep. James Florio of New Jersey, passed by a vote of 323 to 23. While the legislation must still face the scrutiny of the Senate, and ultimately the President, it appears likely that some form of Superfund legislation will be extended beyond 1985. See *infra* at 539–541 & notes 8, 9.

tries to acquire 87.5% of the funds necessary for cleanup efforts and relying on general federal revenues to account for the remaining 12.5% of the fund. 126 *Cong.Reg.* S14967–68 (daily ed. Nov. 24, 1980) (statement of Sen. Stafford).

The focal point of plaintiffs' preemption argument is that language of section 114(c) of Superfund that excludes contribution to any fund whose purpose is to pay compensation for claims "for any costs of response or damages or claims which *may be compensated* under this subchapter." 42 *U.S.C.A.* § 9614(c) (emphasis added). Plaintiffs maintain that through this section of Superfund, read in conjunction with Article VI, clause 2 of the United States Constitution[7], Congress expressly preempted New Jersey's Spill Fund taxation scheme.

[1, 2] As Judge Evers noted,

> [i]t is fundamental that where a state statute conflicts with a federal statute which has preempted the field and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Supremacy Clause of the United States Constitution mandates that the state statute must fail. [4 *N.J.Tax* at 304.]

An allegation of preemption must be analyzed with reference to several general guidelines: "Does the federal statute expressly or by necessary implication indicate exclusivity? * * * Is the federal scheme so pervasive that it precludes coexistence of state regulation? * * * [and] Does the state program stand 'as an obstacle to the accomplishment and execution of the full pur-

[7] This clause of the United States Constitution, more commonly referred to as the supremacy clause, provides:

> This Constitution, and the Laws of the United States which shall made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

poses and objectives of Congress'?". *U.S.A. Chamber of Commerce v. State*, 89 *N.J.* 131, 142 (1982) (citations omitted); *see also Feldman v. Lederle Laboratories*, 97 *N.J.* 429, 458 (1984) (discussing question of preemption in products liability field). However, courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible. *Florida Lime & Avocado Growers v. Paul*, 373 *U.S.* 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248 (1963); *Huron Cement Co. v. Detroit*, 362 *U.S.* 440, 80 *S.Ct.* 813, 4 *L.Ed.*2d 852 (1960). "Pre-emption of state law by federal statute is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 *U.S.* 311, 317, 101 *S.Ct.* 1124, 1130, 67 *L.Ed.*2d 258, 264–65 (1981) (quoting *Florida Lime & Avocado Growers, supra*, 373 *U.S.* at 142, 83 *S.Ct.* at 1217, 10 *L.Ed.*2d at 257).

[3] Thus, in determining the proper construction of allegedly conflicting statutes, courts must perform "essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Chicago & N.W. Transp. Co., supra*, 450 *U.S.* at 317, 101 *S.Ct.* at 1130, 67 *L.Ed.*2d at 265 (quoting *Perez v. Campbell*, 402 *U.S.* 637, 644, 91 *S.Ct.* 1704, 1708, 29 *L.Ed.*2d 233, 239 (1971)).

Moreover, as the Courts in *Florida Lime & Avocado Growers, supra*, 373 *U.S.* 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248, explained, it is not a question of "whether the *purposes* of the two laws are parallel or divergent," but rather a court must determine "whether both regulations can be enforced without impairing the federal superintendence of the field * * *." *Id.* at 142, 83 *S.Ct.* at 1217, 10 *L.Ed.*2d at 156-57 (emphasis in original).

Although plaintiffs argue in favor of the "plain meaning" rule of statutory construction, see 2A *Sutherland Statutory Construction* § 46.01 (C.Sands 4th ed. 1973), we conclude, as did the Supreme Court in *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 *S. Ct.* 1305, 51 *L.Ed.*2d 604 (1977), that "[t]his inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Id.* at 526, 97 *S. Ct.* at 1310, 51 *L.Ed.*2d. at 614. The pertinent language of section 114(c), that "no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which *may be compensated* under this subchapter" (emphasis added), may appear to be clear *language* at first glance, but we can hardly conclude that it conveys a clear and unambiguous *meaning* in light of the purpose and spirit of Superfund as a whole. We are reminded of Judge Learned Hand's ubiquitous observation of some forty years ago:

> There is no surer way to misread any document than to read it literally * * *.
> * * * As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and although their words are by far the most decisive evidence of what they would have done, they are by no means final. [*Guiseppi v. Walling*, 144 *F.*2d. 608, 624 (2d. Cir. 1944) (L. Hand, Jr., concurring), aff'd. *sub nom. Gemsco, Inc. v. Walling*, 324 *U.S.* 244, 65 *S.Ct.* 605, 89 *L.Ed.* 921 (1945).]

As plaintiffs read "may be compensated", the phrase implicates only a permissive meaning. In other words, plaintiffs claim that if New Jersey's Spill Fund has as its purpose to pay compensation for claims that "might conceivably be compensated" by Superfund, then plaintiffs cannot be required to pay into Spill Fund. Thus, plaintiffs maintain that the Court's function is to

apply the statute according to its stated terms without the aid of legislative history or extrinsic evidence.

However, as Judge Evers pointed out, "[t]he seemingly simple, but often misused and misapplied word 'may' is anything but unambiguous." 4 *N.J. Tax* at 307. The standard-dictionary definition of the word "may" ranges from "have the ability or competence to," *Webster's Third New International Dictionary* 1396 (1971), and "be in some degree likely to," *id.*, to "shall, must—used esp[ecially] in deeds, contracts, and statutes," *id.*, and "shall, must—used in law where the sense, purpose, or policy requires this interpretation," *Webster's New Collegiate Dictionary* 711 (1976). A legal-dictionary definition of the word "may" states that "[r]egardless of the instrument, however, whether constitution, statute, deed, contract or whatever, courts not infrequently construe 'may' as 'shall' or 'must' to the end that justice may not be the slave of grammar." *Black's Law Dictionary* 883 (rev. 5th ed. 1979). One court discussed this dilemma in *Kraft v. Board of Educ. for D.C.*, 247 *F.Supp.* 21 (D.D.C.1965), *cert. denied*, 386 *U.S.* 958, 87 *S.Ct.* 1026, 18 *L.Ed.*2d 106 (1967):

> It is well established, however, that the word "may" can be construed to be "shall", just as the word "shall" may be construed to mean "may". The interpretation of those words depends upon the context in which they are used and the intention of the legislative body as is shown by the statute and as may be gleaned from committee reports and similar authoritative sources. [*Id.* at 24–25.]

Accord Bell v. Western Employer's Ins. Co., 173 *N.J.Super.* 60, 65 (App.Div.1980) (in dictum, noting that "may" and "shall" "may be deemed interchangeable when necessary to execute the clear intent of the Legislature"); *MacNeil v. Ann Klein*, 141 *N.J.Super.* 394, 402 (App.Div.1976) (in dictum, "the word 'may' should be given the meaning which conforms to the legislative intent").

[4] Thus, plaintiffs' reliance on any notion of a "plain meaning" rule in this situation must fail. Moreover, as Judge Evers stated, "[r]eference to legislative history is appropriate not only where the statutory language is ambiguous but also where a literal interpretation would thwart the overall statutory scheme." 4 *N.J.Tax* at 307–08 (citing *International T & T Corp. v. General T. & E. Corp.*, 518 *F.*2d 913, 921 (9th Cir.1975)). We therefore direct our attention to the meaning of section 114(c) in the context of the supportive provisions of Superfund and the legislative background of the whole of Superfund.

Although it may be true that many of the purposes to which Superfund moneys are put overlap with the purposes of Spill Fund, this fact alone does not require a conclusion of preemption. In *Florida Line & Avocado Growers, supra,* 373 *U.S.* 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248, the Court stated that the contention that such a situation compels preemption tends to "obscure more than aid in the solution of the problem. * * * This Court has, on one hand, sustained state statutes having objectives virtually identical to those of federal regulations * * * and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar * * *." *Id.* at 141–42, 83 *S.Ct.* at 1217, 10 *L.Ed.*2d at 256 (citations omitted). Hence, it is far more useful to examine a challenge of preemption in the light of what Congress intended the relationship to be between Superfund and state statutes such as Spill Fund.

Whereas plaintiffs contend that the language used in section 114(c) of Superfund demonstrates an intent on the part of Congress to repose in the federal government exclusively the power to maintain a fund for the cleanup and removal of hazardous substances, it is clear from the surrounding provisions of Superfund and its legislative history that Congress actually envisioned a cooperative arrangement between the federal and state

governments. Superfund recognizes its limits and in fact provides for active state financial and technical cooperation in hazardous-waste cleanup activities. *See, e.g.,* 42 *U.S.C.A.* § 9604(c)(2) (requires consultation by President with affected states prior to determination of any appropriate remedial action); 42 *U.S.C.A.* § 9604(c)(3) (mandates a minimum level of state financial and technical (contract or cooperative agreement) participation as a prerequisite to receiving federal cleanup funds); 42 *U.S.C.A.* § 9604(d)(1) (encourages states with the capability to carry out cleanup actions to do so with reimbursement from Superfund); 42 *U.S.C.A.* § 9605(4) (requires adoption of National Contingency Plan setting forth, among other things, "appropriate roles and responsibilities for the Federal, State, and local government * * * in effectuating the plan"); and 42 *U.S.C.A.* § 9614(a) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substance within such State.") These provisions exemplify the intended interdependence between Superfund and state programs.

Courts frequently refer to events occurring immediately prior to the time of enactment as an extrinsic aid in fathoming legislative intent. *See* 2A *Sutherland Statutory Construction, supra,* at § 48.04. Of persuasive significance, therefore, is the colloquy between Senator Bradley of New Jersey and Senator Randolph of West Virginia that preceded the enactment of Superfund. Because Senator Randolph was the chairman of the Committee on Environment and Public Works, which reported the Superfund bill to the Senate, as well as floor manager and cosponsor of the measure, his explanations and comments with respect to the interpretation of Superfund provisions deserve particular deference. *See* 126 *Cong.Rec.* S14941–15008 (daily ed. Nov. 24, 1980); *see also F.E.A. v. Algonquin SNG, Inc.,* 426 *U.S.* 548, 564, 96 *S.Ct.* 2295, 2304, 49 *L.Ed.*2d 49, 60 (1976)

(relying on Senate floor debates for support in statutory construction, the Court pointed out that "as a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute"); *Brennan v. Corning Glass Works,* 480 *F.*2d 1254, 1260 (3d Cir.1973) (recognizing that "a sponsor's views are entitled to great weight"); 2A *Sutherland Statutory Construction, supra,* at § 48.15 (noting "reality of legislative practice" that legislators look to sponsors as sources of information corcerning a bill's purpose, meaning, and intended effect).

Senator Bradley set the tenor of his dialogue with Senator Randolph by expressing the following concerns and identifying the issues that their comments would attempt to clarify:

> New Jersey and several of the other States with successful State spill funds (including Michigan, Florida, California, Maryland, and New York) have on repeated occasions expressed grave concerns that the preemption language contained in this bill may work to slow down governmental response to spills of oils and hazardous wastes by creating questions as to the availability of State and [/]or Federal funds to provide operating, up front dollars to finance emergency cleanup and containment actions. I understand the concern debated over the years in conjunction with superfund that industry not be forced to suffer a double tax for the same functions carried out by different levels of government.
>
> * * * * * * * *
>
> Mr. President, in order to clarify the remaining questions concerning allowable State activity under this bill's preemption language, I wonder if the Senator [Randolph] from West Virginia would consent to a few questions on this issue? [126 *Cong.Rec.* S14981 (daily ed. Nov. 24, 1980).]

The colloquy that followed these introductory remarks leaves little doubt that section 114(c) was not intended as a total preemption of state involvement in hazardous-waste cleanup

efforts. First, the remarks of Senator Randolph lend strong support to that conclusion:

> [Mr. BRADLEY.] Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund for the purpose of reimbursing claims already provided for in this legislation?
>
> Mr. RANDOLPH. Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay damage compensable under this bill.
>
> Mr. BRADLEY. However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.
>
> Mr. RANDOLPH. The Senator is correct. [*Id.*]

Should any doubt remain, the following excerpts establish that the interrelationship between Superfund and state cleanup funds allows for state funds to fill in the gaps left by Superfund:

> Mr. RANDOLPH. * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill.
>
> * * * * * * * * *
>
> Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a State may make of its money, nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.
>
> In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

Mr. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?

Mr. RANDOLPH. That is correct.

Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

Mr. RANDOLPH. That is correct.

Mr. BRADLEY. Finally, if the Federal Government determines that the needs at other sites require that Federal efforts be terminated at the first site before that site is completed, may a State fund complete the effort?

Mr. RANDOLPH. This legislation would permit that to happen. [*Id.*]

As the Tax Court noted, "[t]he Randolph interpretation, which would enable states to tax for remedial actions not actually compensated under super fund, comports with a prohibition against double taxation in that states are still prevented from taxing to pay for cleanups actually financed by the Federal Government." 4 *N.J.Tax* at 310.

This conclusion, that Superfund preempts state taxation only when the state fund thereby created is used to compensate cleanup activities already compensated by Superfund, finds support also in the recent comments of the House of Representatives Committee on Energy and Commerce. [8] In its Report dated

[8] In this connection we are reminded that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, * * * such views are entitled to significant weight * * * and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 *U.S.* 572, 596, 100 *S.Ct.* 800, 814, 63 *L.Ed*2d 36, 54 (1980) (citations omitted); *accord Bell v. New Jersey &*

July 16, 1984, the Committee on Energy and Commerce, to which H.R. 5640 ("Superfund Expansion and Protection Act of 1984") was referred, addressed Superfund's relationship to other law and, in particular, the pending bill's repeal of Superfund's preemption provision:

> The section repeals the provision of current law which preempts state taxing authority in certain circumstances. The Committee is aware that the current law's preemption of state taxing authority has been interpreted by some to constitute a total elimination of state authority in this area. *The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund.* To avoid any possible misinterpretation of the law which could further restrict the states' efforts to raise the funds necessary to meet their matching share obligations under the program, the legislation repeals the current law's

Pennsylvania, 461 *U.S.* 773,—, 103 *S.Ct.* 2187, 2194, 76 *L.Ed.*2d 312, 323, (1983) ("[T]he view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.") *Edwards v. Mayor and Council of Moonachie*, 3 *N.J.* 17, 24 (1949) ("[W]hile entitled to due consideration, the subsequent legislative construction of a statute is not conclusive of the significance of the prior act."). *But cf. Garden State Farms, Inc. v. Bay*, 77 *N.J.* 439, 453 (1978) ("We believe that '* * * caution must be exercised in using the action of the legislature on proposed amendments as an interpretative aid' in discerning legislative intent. 2A *Sutherland, Statutory Construction*, § 48.18 at 225 (Sands ed. 1973).").

On May 10, 1984, H.R. 5640 was referred jointly to the Committees on Energy and Commerce and Public Works and Transportation for a period ending not later than July 24, 1984, as well as to the Committee on Ways and Means. On August 10, 1984 the House of Representatives passed H.R. 5640. *See supra* note 6, at 531–532. Thus, although we realize that this legislation is pending senatorial and presidential approval, we find that the relevancy of the statements contained in the Committee report should not be overlooked.

> preemption provision in its entirety.[9] [*H.R.Rep.No.* 890, Part 1, 98th Cong., 2d Sess. 58-59 (1984) (footnote and emphasis added).]

Thus, not only does the colloquy between Senators Bradley and Randolph support the conclusion that total preemption was not intended, but Congress itself is now trying to clarify what it views as a misinterpretation of the enacting Congress' intent.

We note too that when enacted, Superfund was recognized by various members of Congress as providing for an insufficient funding level to tackle the cleanup and removal of hazardous-waste sites that existed at that time. *See* 4 *N.J.Tax* at 312–13. *See generally* 126 *Cong.Rec.* S15007 (daily ed. Nov. 24, 1980) (remarks of Sen. Stafford); *S.Rep.No.* 848, 96th Cong., 2d Sess. 17, 71 (1980); *H.R.Rep.No.* 1016, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 *U.S. Code Cong. & Ad. News* 6119, 6123. This feature—the inadequacy of Superfund to meet cleanup needs—empahsizes Congress' probable intent to allow states to continue their own efforts to assist in cleanup activities.

Another source of interpretive information is the comments made by the federal administrative agency charged with the authority to implement the statute in question. "It is a fundamental maxim that the opinion as to the construction of a regulatory statute of the expert administrative agency charged with the enforcement of that statute is entitled to great weight and is a 'substantial factor to be considered in construing the statute.' " *New Jersey Guild of Hearing Aid Dispensers v. Long,* 75 *N.J.* 544, 575 (1978) (citing *Youakim v. Miller,* 425 *U.S.*

[9] If enacted, section 118 of the legislation would amend section 114(c) of Superfund to read as follows:

> (c) Notwithstanding any provision of this or any other law, a State may require any person to contribute to any fund the purpose of which is to pay compensation for claims for any costs of response or damages which may be compensated under this Act. [*H.R.Rep.No.* 890, Part 1, 98th Cong., 2d Sess. 12 (1984).]

231, 235, 96 *S.Ct.* 1399, 1402, 47 *L.Ed.*2d 701, 706 (1976)). In this case that agency is the Environmental Protection Agency. In an Executive Summary memorandum, the Administrator of the EPA discussed the preemption issue and stated that section 114(c) of Superfund "does not apply to State funds which are used * * * : * * * To compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by [Superfund] but for which no federal reimbursement is provided." *Office of Emergency and Remedial Response, U.S. Environmental Protection Agency, Guidance: Cooperative Agreements and Contracts with States Under the Compehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96–510)* ix-x (March 1982). This interpretation is consistent with both the legislative history and with the broad remedial goals of Superfund.

In *San-Lan Builders, Inc. v. Baxendale, 28 N.J.* 148 (1958), this Court recognized the need to look to the general tenor of the law:

> [I]n this quest for the true intention of the law, the letter gives way to the obvious reason and spirit of the expression, and to this end the evident policy and purpose of the act constitute an implied limitation on the sense of general terms and a touchstone for the expansion of narrower terms. * * * Scholastic strictness is to be avoided in the search for the legislative intention. The particular terms are to be made responsive to the essential principle of the law. It is not the words but the internal sense of the act that controls. Reason is the soul of law. *Wright v. Vogt*, 7 *N.J.* 1 (1951). [*Id.* at 155.]

Thus, as Judge Evers reasoned,

> [i]f § 114(c) is read to preempt *all* state taxation for hazardous waste cleanups, the clause would undermine the salutary statutory goals of [Superfund] and would result in actually limiting the number of cleanups which could otherwise be initiated by the

state in spite of the fact that [Superfund] was intended to expand cleanup efforts. [4 *N.J. Tax* at 311 (emphasis added).]

In fact, the National Contingency Plan, prepared in accordance with section 105 of Superfund, 42 *U.S.C.A.* § 9605, provides for the listing of "at least four hundred of the highest priority facilities". 42 *U.S.C.A.* § 9605(8)(B).[10] However, the National Contingency Plan also recognizes the inability of Superfund to compensate all sites and therefore requires "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action * * *." 42 *U.S.C.A.* § 9605(8)(A). Thus, some sites in need will not make the priority list and will therefore not be eligible for Superfund compensation. *See* 40 *C.F.R.* § 300.68(a). Hence, there will no doubt be sites that are excluded from the section 114(c) test of "may be compensated under this subchapter." 42 *U.S.C.A.* § 9614(c); *see also* 4 *N.J. Tax* at 312 n.9 (stating that at that time only twelve of New Jersey's 235 sites were qualified for priority treatment). Given the national interest in cleaning up and removing hazardous waste from our environment, we would be hard pressed to interpret the legislation as prohibiting states from supplementing the federal movement to combat this problem. As the Tax Court stated, "[i]t simply strains credulity to say that hazardous waste sites or spills not meeting the [priority list] criteria are claims which 'may be compensated' under [Superfund]." 4 *N.J.Tax* at 313.

[10] 42 *U.S.C.A.* § 9605(8)(B) provides that the President shall list national priorities among known or threatened releases throughout the United States and shall revise the list "no less often than annually." In performing this function the President "shall consider any priorities established by the States."

III

[5] The Tax Court emphasized that the underlying scheme of Superfund is one that "allows, but does not require, cooperation of the federal and state regimes." *Id.* at 315. A thorough understanding of this cooperative relationship leads us to the natural conclusion that section 114(c) of Superfund does not preempt Spill Fund in respect of funds that are used to compensate hazardous-waste cleanup costs and claims not covered or not in fact compensated by Superfund moneys. While we are mindful of "the obvious limitation that a double tax could not be collected and expended on any one project," *id.* at 320, we have no doubt that Congress' enactment of Superfund was aimed at providing a federal framework to supervise the revitalization of our environment. Surely Congress did not intend for the states just to sit back and wait for hazardous-waste compensation that might never be awarded.

The more logical conclusion, based particularly on the legislative history surrounding the enactment of Superfund, is that Congress contemplated that the federal government would attempt to deal with the problems of the most seriously affected sites (those listed in accordance with the National Priority Plan) and to allow states to maintain a compensation fund, or to use general revenues should they choose, to conduct their own cleanup efforts on those sites not receiving Superfund compensation and to provide for their cooperative program components including their 10% share of cleanup costs, related administrative costs for equipment and personnel, and other program features not covered by Superfund such as containment and indemnity.

We therefore hold that the Spill Fund tax imposed on plaintiffs is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund. The underlying intent of Superfund, as well as the legislative history, mandates a conclusion of no preemption.

Affirmed.

For affirmance—Chief Justice WILENTZ, Justices CLIFFORD, SCHREIBER, HANDLER and POLLOCK, and Judge FRITZ—5.

For reversal—None.

EXXON CORPORATION, ET AL., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF N.J. SPILL COMPENSATION FUND, ET AL., DEFENDANTS-RESPONDENTS.

and

EXXON CORPORATION, ET AL., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF N.J. SPILL COMPENSATION FUND, ET AL., DEFENDANTS-RESPONDENTS.

EXXON CORPORATION, ET AL., APPELLANTS, v. KENNETH R. BIEDERMAN, TREASURER OF THE STATE OF N.J., AND THE N.J. DEPARTMENT OF THE TREASURY, RESPONDENTS.

Superior Court of New Jersey
Appellate Division

Argued May 17, 1983—Decided June 22, 1983.

SYNOPSIS

Appeals were taken challenging a declaratory judgment of the Tax Court, 4 N.J. Tax 294, determining the extent to which the taxing provisions of the New Jersey Spill Fund and Compensation Act are preempted by federal law and the validity of certain regulations promulgated by the State Treasurer under the Spill Fund Act. The Superior Court, Appellate Division, Antell, J.A.D., held that failure to comply with clearly stated requirements of Administrative Procedure Act rendered regulations promulgated by the State Treasurer invalid.

Affirmed.

Matthews, P.J.A.D., filed a concurring opinion.

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1. Health and Environment ⇐25.7(23)

Adoption of regulations governing expenditures under New Jersey Spill Fund and Compensation Act, after erroneously treating plaintiffs' hand-delivered written comments as untimely, did not comply with Administrative Procedure Act and thus regulations were invalid, despite Department of Treasury's contention that it had "become familiar" with plaintiffs' position before proposing regulations. N.J.S.A. 52:14B–1 et seq., 52:14B–4(a)(1), (d), 58:10–23.11t.

2. Administrative Law and Procedure ⇐395

Substantial compliance with Administrative Procedure Act cannot be found where prescribed system of notice and written comments has been sidestepped. N.J.S.A. 52:14B–1 et seq.

Before Judges MATTHEWS, ANTELL and FRANCIS.

John J. Carlin, Jr., argued the cause for appellants, (*Farrell, Curtis, Carlin & Davidson,* attorneys; *John J. Carlin* and *Lisa J. Pollack* on the brief).

Mary C. Jacobson, Deputy Attorney General, argued the cause for respondents (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *Michael R. Cole,* Assistant Attorney General, of counsel and *Mary C. Jacobson* on the brief).

The majority opinion of the court was delivered by

ANTELL, J.A.D.

These are consolidated appeals challenging (1) a declaratory judgment of the Tax Court determining the extent to which the taxing provisions of the New Jersey Spill Fund and Compensation Act, *N.J.S.A.* 58:10–23.11h are preempted by section 114(c) [1] of the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 42 *U.S.C.A.* § 9601 *et seq.* and (2) the validity of certain regulations promulgated by the State Treasurer under the Spill Fund Act. We affirm the judgment of the Tax Court substantially for the reasons stated by Judge Evers in his written opinion published at 4 *N.J. Tax* 294 (Tax Ct. 1982).

Pursuant to *N.J.S.A.* 58:10–23.11t the State Treasurer and the spill fund director are authorized to adopt such rules and regulations pursuant to the Administrative Procedure Act as they may deem necessary to accomplish their purposes and responsibilities under the Spill Fund Act. *N.J.S.A.* 52:14B–4(a)(1) of the Administrative Procedure Act requires the agency to give 30 days public notice prior to the adoption, amendment or repeal of any rule. Subsection (3) requires the agency to

> Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule.

[1] On January 4, 1982 the Department of Treasury published its proposed regulations governing expenditures under the Act in the New Jersey Register, 14 *N.J.R.* 36, inviting interested parties to submit their comments on or before February 13, 1982. Plaintiffs hand delivered their written comments on February 11, 1982, but the department erroneously determined that they were "untimely and need not be considered," and on March

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[1] 42 *U.S.C.A.* § 9614(c)

15, 1982 published a Notice of Adoption of the Regulations in the New Jersey Register, 14 *N.J.R.* 285. On March 29, 1982 plaintiffs submitted their written request that the department correct its error by rescinding its regulations and re-proposing them with provision for a "meaningful comment period." Their request was denied by letter from the Assistant State Treasurer dated April 7, 1982.

The State's position with respect to this issue is that the omission was only "a technical error which does not justify the invalidation of the regulations." It points out that although plaintiffs' comments were treated as untimely received for purposes of entitlement to consideration before adoption of the regulations the Department had nevertheless "become familiar" with plaintiffs' position before proposing the regulations. Relying upon *N.J.S.A.* 52:14B–4(d), it maintains that the validity of the regulations should be sustained on the basis of its "substantial compliance" with the provisions of the Administrative Procedure Act.

[2] The explanations offered by the State fail to justify its non-compliance with the clearly stated requirements of the Administrative Procedure Act. Although its disregard of the Act is not as complete as that considered in *Glaser v. Downes,* 126 *N.J. Super.* 10 (App. Div. 1973), certif. den. 64 *N.J.* 573 (1974), the denial of due process of law resulting to plaintiffs is no less. Substantial compliance with the Administrative Procedure Act cannot be found where the prescribed system of notice and written comments, called "the mainstay of modern rulemaking procedure," *Davis, Administrative Law of the Seventies,* at 169 (1976), has been sidestepped.

We conclude that the regulations under review adopted by notice published March 15, 1982 are invalid and without force and effect.

MATTHEWS, P.J.A.D. (concurring).

I agree with the conclusion reached by Judge Evers in the Tax Court which we now affirm. I also agree that plaintiffs were denied due process of law in the rule-making process. I am constrained to file this concurring opinion, however, because there appears to be a general assumption in the majority opinion that the Congress could preempt New Jersey's taxation provision if it so intended. I think that such an assumption is erroneous.

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . . [*U.S. Const.*, Art. VI, cl. 2]

I question whether a statute passed by Congress which denies to the states the right to tax for the purposes of the Spill Fund is "made in Pursuance" of the Constitution. A state may not tax imports or exports, federal property, or interstate commerce discriminatorily, or in any fashion that could obstruct a legitimate exercise of Congressional power. Beyond those limitations, the states have broad powers to structure revenue raising taxes as they see fit. As Judge Evers found, "plaintiffs neither raised nor attempted to support any argument that the taxing provisions of spill fund were violative of any other constitutional rights." 4 *N.J. Tax* at 316. He also noted that "plaintiffs do not suggest that there is an actual conflict between the limited purposes of super fund and the overall policy enunciated by New Jersey in spill fund." *Id.* Plaintiffs do not contest these statements on appeal. Thus, the underlying premise of both plaintiffs' argument here and of Judge Evers' opinion is that if Congress implicitly or explicitly intended to preclude the states from taxing for any purpose which is otherwise constitutional it has the power to do so under the Supremacy Clause.

The most basic premise of our constitutional form of government is that in the Constitution the sovereign states relinquished certain of their sovereign powers to the federal government for its exclusive exercise. *See Goldstein v. California,* 412 *U.S.* 546, 552, 93 *S. Ct.* 2303, 2307, 37 *L.Ed.*2d 163, reh. den. 414 *U.S.* 883, 94 *S.Ct.* 27, 38 *L.Ed.*2d 131 (1973). "But . . . the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *Id.* 412 *U.S.* at 552–553, 93 *S.Ct.* at 2308, quoting from Number 32 of *The Federalist* by Alexander Hamilton (emphasis in original).[1] Hamilton went on to specify the three instances when state sovereignty would be deemed alienated: ". . . where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority, and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *Id.;* emphasis in original.

[1] *E.g.*, the first paragraph of *The Federalist* 32 reads:

> Although I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply by their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

As in *Jones v. Rath Packing Co.,* 430 *U.S.* 519, 524–525, 97 *S.Ct.* 1305, 1309, 51 *L.Ed.*2d 604, reh. den. 431 *U.S.* 925, 97 *S.Ct.* 2201, 53 *L.Ed.*2d 240 (1977), this case "contains no claim that the Constitution alone denies [New Jersey] power to enact the challenged provisions." In fact "the breadth of concurrent taxing powers of state and nation" have long been recognized. *Hines v. Davidowitz,* 312 *U.S.* 52, 68, n. 21, 61 *S.Ct.* 399, 404, n. 21, 85 *L.Ed.* 581 (1940), citing No. 32, *The Federalist.* Over one hundred years ago the Court found "nothing in the Constitution which contemplates or authorizes any direct abridgement of [the concurrent powers to tax] by national legislation." *Lane County v. Oregon,* 7 *Wall.* 71, 74 *U.S.* 71, 77, 19 *L.Ed.* 101, 105 (1868). "The extent to which [a State's power to tax] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the Legislatures to which the States commit the exercise of the power." *Id.* The only limits to a State's power to tax outside of those explicitly stated in the Constitution is that a tax "must not be used as to burden or embarrass the operations of the National Government." *Id.*

The idea that a state has "the freedom of a sovereign both as to objects and methods" of taxation has been frequently repeated. *Shaffer v. Carter,* 252 *U.S.* 37, 51–52, 40 *S.Ct.* 221, 225, 64 *L.Ed.* 445 (1919), quoting *Michigan C.R. Co. v. Powers,* 201 *U.S.* 245, 292, 26 *S.Ct.* 459, 462, 50 *L.Ed.* 744 (1906). This freedom extends without interference "even if the effect . . . is akin to double taxation . . . since it is settled that nothing in [the Federal Constitution] or in the 14th [*sic*] Amendment prevents the states from imposing double taxation." 252 *U.S.* at 58, 40 *S.Ct.* at 227. As long as there is "some adequate or reasonable basis" for the taxation classifications double taxation is not forbidden. *Swiss Oil Corp. v. Shanks,* 273 *U.S.* 407, 413, 47 *S.Ct.* 393, 395, 71 *L.Ed.* 709 (1926).

Close federal supervision of states' taxing power would be "intolerable" and "hostile to the basic principles of our Government. . . ." *Allied Stores of Ohio v. Bowers,* 358 *U.S.* 522, 527, 79 *S.Ct.* 437,441,3 *L.Ed.*2d 480 (1959), quoting *Ohio Oil Co. v. Conway,* 281 *U.S.* 146, 159, 50 *S.Ct.* 310, 314, 74 *L.Ed.* 775 (1929). Some limits to a state's power to tax are found in the Equal Protection Clause, but "that clause imposes no iron rule of equality," 358 *U.S.* at 526, 79 *S.Ct.* at 440. The tax must have a rational basis and may not be "palpably arbitrary." Id. at 527, 79 *S.Ct.* at 441. It is also well established that the Supremacy Clause prohibits states from taxing the United States or its property directly. *Washington v. United States,* ——*U.S.*——, ——, 103, *S.Ct. 1344, 1348, 75 L.Ed.*2d 264, 268 (1983). But even that prohibition has been very narrowly construed and "the States' power to tax can be denied only under 'the clearest constitutional mandate,'" *Id.* at ——, 103 *S.Ct.* at 1351, 75 *L.Ed.*2d at 273, quoting *Michelin Tire Corp. v. Wages,* 423 *U.S.* 276, 293, 96 *S.Ct.* 535, 544, 46 *L.Ed.*2d 495 (1976), as cited in *United States v. New Mexico,* 455, *U.S.* 720, 737–738, 102 *S.Ct.* 1373, 1384, 71 *L.Ed.*2d 580 (1982). State taxes which affect interstate commerce must have a reasonable nexus between the taxing state and activities being taxed and must not discriminate against interstate commerce in favor of intrastate commerce or unduly infringe upon Congress' right to regulate interstate commerce. *See* generally, *Tribe, American Constitutional Law,* § 6–14, 15. The Constitution explicitly prohibits states from laying "any Imposts or Duties on Imports or Exports. . . ." *U.S. Const.,* Art. I, § 10, cl. 2. *See also Michelin Tire Corp. v. Wages, supra,* 423 *U.S.* 276, 96 *S.Ct.* 535, 46 *L.Ed.*2d 495.

Plaintiffs in this case make no allegations that the State has transgressed any of these limits on its spill fund tax. Their argument is based on an interpretation that § 114(c) of the Superfund precludes states from taxing for the same purpose as

the Superfund. In light of the strong history of the states' freedom as to the "modes and subjects" of their taxation schemes, and the Supreme Court's approval of double taxation, there must be some demonstration that New Jersey's tax somehow stands as an obstacle to the accomplishment of any of the permissible goals of the Superfund. I know of no authority which would permit Congress to prohibit a state from imposing an otherwise constitutional tax simply because it had determined that the taxpayer should not be taxed by both the federal and state governments. Presumably Congress could impose such a prohibition if it determined the state tax unduly interfered with its regulation of interstate commerce but, again, no such allegations have been presented here. The Supreme Court has admonished and repeated "[w]e must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise." *Goldstein v. California,* 412 *U.S.* at 554, 93 *S.Ct.* at 2309. No allegation of any conflict has been made.

The Supreme Court has stated in numerous cases that when the federal government has not been given exclusive control over a given matter "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 *U.S.* 725, 746, 101 *S.Ct.* 2114, 2129, 68 *L.Ed.*2d 576 (1981). Certainly there should be no finding that congressional action precludes the states from exercising their powers to tax without some clear indication that Congress has a constitutional basis for so doing.

We should bear in mind that private parties have chosen to litigate this issue. This case does not represent a direct conflict between state and federal authorities. Perhaps the issue would be better framed as "Does New Jersey have the power to impose the Spill Fund Tax on these plaintiffs?" Such a reformulation

recognizes that this case clearly is one arising under the state law. It also emphasizes that this is a matter betweeen the private plaintiffs and the State of New Jersey. As Exxon has attempted to structure its arguments, it is attempting to assert a power of the federal government which that government may or may not even believe it possesses.

EXXON CORPORATION, THE B.F. GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC., PLAINTIFFS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION; AND THE STATE OF NEW JERSEY, DEFENDANTS.

EXXON CORPORATION, THE B.F. GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC., PLAINTIFFS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION; JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION; AND THE STATE OF NEW JERSEY, DEFENDANTS.

Tax Court of New Jersey

April 23, 1982.

SYNOPSIS

In a case involving constitutionality of state Spill Compensation and Control Act, the Tax Court, Evers, J. T. C., on cross motions for summary judgment, held that such state statute has not been preempted by the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980.

Plaintiffs' motion denied, and defendants' motion granted.

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1. States ⇦4.13

Where state statute conflicts with federal statute which has preempted field and stands as obstacle to accomplishment and execution of full purposes and objectives of Congress, supremacy clause of United States Constitution mandates that state statute fail. U.S.C.A.Const.Art. 6, cl. 2; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 104(d)(1), 105, 111(f), 112, 114(a), 42 U.S.C.A. §§ 9604(d)(1), 9605, 9611(f), 9612, 9614(a).

2. States ⇦4.13

Where Congress has not foreclosed field, state statute is nevertheless void to the extent of actual conflict with federal statute. U.S.C.A.Const.Art. 6, cl. 2.

3. States ⇦4.13

Court must attempt to harmonize state and federal laws whenever possible, particularly in areas traditionally reserved to states and relating to vital interests of state citizens. N.J.S.A. 58:10–23.11 et seq.; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101 et seq., 114(c), 42 U.S.C.A. §§ 9601 et seq., 9614(c); U.S.C.A.Const.Art. 6, cl. 2.

4. Health and Environment ⇦25.7(3)

Section of Comprehensive Environmental Response, Compensation and Liability Act of 1980 providing that no person may be required to "contribute to any fund, purpose of which is to pay compensation for claims for any costs of response for damages or claims which may be compensated under this title" is ambiguous, and court must look to extrinsic aids to clarify

legislative scheme, and inquiry requires consideration of relationship between federal and state laws as they ought to be applied, and not merely as written. N.J.S.A. 58:10–23.11 et seq.; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101 et seq., 114(b, c), 42 U.S.C.A. §§ 9601 et seq., 9614(b, c); U.S.C.A.Const.Art. 6, cl. 2.

5. Statutes ⇦217.4

No rule of statutory construction should be permitted to block consideration of any legislative history which could be of aid to court where statutory language is ambiguous or where literal interpretation would thwart overall statutory scheme.

6. States ⇦4.10

Section of Comprehensive Environmental Response, Compensation and Liability Act providing that no person "may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title" is not really preemption clause as term is classically used, and, in addressing "taxing" and not "participation," does not preempt field from state participation. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 114(b, c), 42 U.S.C.A. § 9614(b, c).

7. Taxation ⇦24

Under Comprehensive Environmental Response, Compensation and Liability Act of 1980, state can tax local industries to support fund dedicated to purpose of compensation claims and costs not actually paid by super fund. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 104, 104(c)(2, 3), 111, 112, 114(c), 221, 42 U.S.C.A. §§ 9604, 9604(c)(2, 3), 9611, 9612, 9614(c), 9631; §§ 201, 211, 94 Stat. 2767; 28 U.S.C.A. § 1341; R. 4:46–1; R. 4:46–2;

R. 8:7(a); N.J.S.A. 58:10–23.11f, 58:10–23.11h, 58:10–23i, 58:10–23.11*o*; 26 U.S.C.A. § 4611 et seq.

8. Taxation ⇦24

Under Comprehensive Environmental Response, Compensation and Liability Act of 1980, spill fund, as presently constituted, does protect industry from any threat that New Jersey would stockpile spill tax revenues. N.J.S.A. 58:10–23.11h, subd. b.

9. States ⇦4.10

With respect to dependency, Congress, in adoption of super fund, implicitly acknowledged that direct state action is necessary to assure adequate response action to spills. Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 104(c)(2, 3), (d)(1), 111(f), 112, 114(a), 42 U.S.C.A. §§ 9604(c)(2, 3), (d)(1), 9611(f), 9612, 9614(a).

10. States ⇦4.19

Congressional scheme of super fund is one which allows, but does not require, cooperation of federal and state regimes. Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 105, 105(8)(A, B), 114(c), 42 U.S.C.A. §§ 9605, 9605(8)(A, B), 9614(c).

11. Taxation ⇦24

Under Comprehensive Environmental Response, Compensation and Liability Act section explicitly exempting state tax on petrochemical industries in order to finance purchase of hazardous response equipment, prepositioning of such response equipment and other preparations for response to release of hazardous substances, spill fund tax is valid insofar as such monies are used to satisfy such purposes. N.J.S.A. 58:10–23.11*o*(4); Comprehen-

sive Environmental Response, Compensation and Liability Act of 1980, §§ 101, 114(c), 42 U.S.C.A. §§ 9601, 9614(c).

12. States ⇦4.10

Claims for direct and indirect damages caused by discharge of hazardous substances are within scope of proper spill fund spending under Comprehensive Environmental Response, Compensation and Liability Act explicitly exempting from its provisions state tax on petrochemical industries in order to finance certain measures, and spill fund tax may also be collected and used to pay for petroleum spills, income or property value losses caused by damage resulting from discharge of hazardous substances and cost of restoration or replacement of natural resources damaged or destroyed by discharge. N.J.S.A. 58:10–23.-11b, subd. k, 58:10–23.11g, subds. a, a(1); Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 104(c)(3), 107(a)(4)(A), (f), 111(c)(2), (d)(1), 114(c), 42 U.S.C.A. §§ 9604(c)(3), 9607(a)(4)(A), (f), 9611(c)(2), (d)(1), 9614(c).

13. States ⇦4.10

State fund administrative expenses and administrative costs relating to petroleum spills, reimbursement of third-party damage claims and other claims not compensable under Comprehensive Environmental Response, Compensation and Liability Act of 1980 are proper objects of spill fund spending, and same is true of state's contribution of ten percent of more of costs of remedial action to qualify for federal funding and financing of remedial activities on temporary basis pending super fund reimbursement. N.J.S.A. 58:10–23.11b, subd. k, 58:10–23.11g, subds. a, a(1); Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 104(c)(3), 107(a)(4)(A), (f), 111(c)(2), (d)(1), 114(c), 42 U.S.C.A. §§ 9604(c)(3), 9607(a)(4)(A), (f), 9611(c)(2), (d)(1), 9614(c).

14. States ⇦4.10

Legislature envisioned that spill act would be enforced in conjunction with federal law and with any other applicable law, and even if federal legislation could be construed to preempt part of spill fund, nonpreempted areas would sustain its continued validity. N.J.S.A. 58:10–23.11a, 58:10–23.11v, 58:10–23.11w, 58:10–23.11z; Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 114(c), 42 U.S.C.A. § 9614(c).

John J. Carlin, Jr., for plaintiffs *(Farrell, Curtis, Carlin & Davidson, attorneys).*

Mary C. Jacobson, for defendant *(Irwin I. Kimmelman,* Attorney General of New Jersey, attorney); *Michael Cole & Herbert Glickman,* of counsel.

EVERS, J. T. C.

The issue presented on cross-motions for summary judgment involves the constitutionality of the New Jersey Spill Compensation And Control (spill fund) Act, *N.J.S.A.* 58:10–23.11 *et seq.* Its resolution requires a determination of whether that statute has been preempted by § 114(c) [1] of the Comprehensive Environmental Response, Compensation and Liability (super fund) Act of 1980, *P. L.* 96–510, 94 *Stat.* 2767, codified as 42 *U.S.C.A.* § 9601 *et seq.*, in which event it must fall, as mandated by the Supremacy Clause of the United States Constitution. [2]

[1] 42*U.S.C.* § 9614(c).

[2] The United States Constitution, Art. VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

For the reasons hereafter set forth plaintiffs' motion is denied and defendants' motion is granted. [3]

Plaintiffs also seek a return of all monies paid to New Jersey pursuant to the spill fund since December 11, 1980, the effective date of super fund. [4] Purely legal questions are presented which make the action appropriate for summary judgment. *Tyson v. Groze,* 172 *N.J.Super.* 314, 319, 411 *A.*2d 1170 (App.Div.1980); *Felbrant v. Able,* 80 *N.J.Super.* 587, 590, 194

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[3] Portions of an action instituted by plaintiffs in the Superior Court of New Jersey, Chancery Division—Mercer County (Docket C 4530–80) which was transferred to the Tax Court (Docket SC 319A–81 TC) and consolidated herewith, survive this motion.

[4] A similar action, brought by plaintiffs in the United States District Court for the District of New Jersey, Civil Action 71–1458M, was dismissed on the basis that the Tax Anti-injunction Act, 28 *U.S.C.A.* § 1341, compelled that the matter be determined in a state court. Plaintiffs have appealed that decision to the United States Court of Appeals for the Third Circuit (No. 81–2514). The preemption issue was also raised by the State in a declaratory judgment action brought against the United States (*State of New Jersey et al. v. United States of America et al.*, United States District Court for the District of Columbia, Civil Action No. 81–0945), by which a definitive interpretation of the scope and meaning of the preemption clause of super fund was sought. That action did not involve a review of the New Jersey taxing scheme pursuant to the spill act. It was dismissed. Similar declaratory judgment actions were brought in *Lesniak et al. v. United States of America et al.* (No. 81–977) and *Merlino et al. v. United States of America et al.* (No. 81–1914) in the United States District Court for the District of New Jersey. These matters were settled by stipulation. The State's motion to make the provisions of those settlements part of the record of this controversy for consideration by the court was denied by separate opinion. Lastly, in *State of New Jersey et al. v. Gorsuch et al.*, United States District Court for the District of Columbia, Civil Action No. 81–2269 the court entered an order directing the Environmental Protection Association to have a "National Contingency Plan" in place by May 11, 1982.

During the pendency of this action plaintiffs have continued to pay the spill fund tax according to its terms.

*A.*2d 491 (App.Div.1963). *See, also, Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67, 110 *A.*2d 24 (1954); *R.* 8:7(a); *R.* 4:46–1; *R.* 4:46–2.

Section 114(c) of super fund states:

> Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any persons or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

Plaintiffs, five major corporations whose operations involve the use of recognized hazardous substances, including petroleum, are taxed under both acts. On the basis that both acts have as their principal purposes the payment of claims and costs relating to the cleanup, removal and containment of hazardous substance spills, plaintiffs interpret this provision as precluding New Jersey from collecting any tax that is earmarked for such purposes. Plaintiffs seemingly argue that New Jersey can only gain the use of industry tax monies for cleanup purposes by requesting and obtaining Federal Government participation in a specific project. In the event Federal Government participation is withheld, only general revenues are available for state action, according to plaintiffs. Any areas which may be compensated under spill fund but which may not be compensated under super fund are peripheral, according to plaintiffs, and are so insignificant as to be unable to sustain the state tax. Accordingly, plaintiffs contend that the entire state act must be nullified.

Defendants deny that the spill fund tax is preempted unless there is a precise coincidence of tax money expenditures. In its

more narrow interpretation the State contends that only those spill fund tax monies which are used for identical purposes and which are actually covered by super fund expenditures can be preempted. Furthermore, defendants contend that the statutory scheme designed by Congress in super fund emphasizes the need for a combined federal and state response to toxic contamination. Super fund, according to defendants, provides a framework for a cooperative federalism in which the Federal Government would work with the states to effectuate the broad statutory goals of protecting the citizens and the environment of the country from the deleterious effects of pollution caused by hazardous substances. In short, it is defendants' position that not only can super fund and spill fund, as presently constituted, co-exist but that they are intended to co-exist. Alternatively, the State argues that, if preemption does exist, it is not total and the taxes collected as to the non-preempted areas are permissible. In order to place these contentions in proper perspective a review of the purposes and pertinent provisions of both statutes is necessary.

Spill fund, which become effective in 1977, in its general terms prohibits the discharge of petroleum and other hazardous substances in the State of New Jersey. Pertinent to this controversy are its specific provisions which provide for the removal and cleanup of such discharges, *N.J.S.A.* 58:10–23.11f, the establishment of a spill compensation fund, *N.J.S.A.* 58:10–23.11i, and the raising of revenue therefor pursuant to *N.J.S.A.* 58:10–23.11h, which states: "There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee. . . ." [5] The administrator of the fund is directed,

[5] That each plaintiff is a major facility as defined in the spill fund act is not disputed.

pursuant to *N.J.S.A.* 58:10–23.11*o*, to disburse monies from the fund for the following purposes:

1. All costs incurred by the State in connection with the removal and cleanup of hazardous substance discharges.

2. All direct and indirect damages no matter by whom sustained, including but not limited to:

a. The cost of restoring, repairing or replacing any real or personal property damaged or destroyed by a discharge; any income lost as a result of damage to or destruction of such property; any reduction in value of such property as a result thereof.

b. The cost of restoration and replacement of damaged or destroyed natural resources.

c. Loss of income or impairment of earning capacity due to damage to real or personal property.

d. Loss of tax revenues by the state or local governments resulting from damage to such property for a period of one year.

e. Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the effects of a discharge pending payment of the claim.

N.J.S.A. 58:10–23.11*o* also provides for the disbursement of sums, as may be appropriated by the Legislature, for research on the prevention and effects of spills, for the development of improved cleanup and removal operations, for demonstration programs and for administration, personnel and equipment costs. [6]

[6] While it may not be an eligible cost under the spill fund act as presently constituted, it is apparent that super fund contemplated that seed money, including at least a 10% matching fund, will be contributed by those states which seek to qualify for federal funding.

During the latter 1970s the Congress undertook the task of developing a program to deal with national hazardous waste problems. At one point in its deliberations Congress debated establishing a fund of $4.1 billion for that purpose. On December 11, 1980 these federal legislative efforts culminated in the enactment of super fund which provides $1.6 billion over a five-year period for the cleanup and removal of pollution caused by the release of hazardous substances into the environment. To finance this program Congress levied a tax against the chemical and petroleum industries designed to provide 87.5% of the funds needed to support the federally-approved cleanup efforts. The remaining 12.5% is supplied through general federal revenues. §§ 111, 112, 201, 211 and 221.

Section 104 of super fund provides generally that whenever there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to remove or arrange for the removal of, and to provide for remedial action relating to such hazardous substance, pollutant or contaminant. Section 211 provides for the amendment of chapter 38 of the Internal Revenue Code to impose a tax on crude oil and petroleum products and on certain chemicals. This amendment became effective April 1, 1981. Pursuant to § 111 of super fund the President is authorized to use the money in the fund for, among other things, payment of costs of government response to hazardous waste discharges and costs incurred in compensating certain losses resulting from such discharges.

Recognizing that some states had already occupied the field and, in an implicit acknowledgement that such state involvement was necessary to assure more complete responsive action to hazardous waste spills, Congress provided in § 104(c)(2) that the Federal Government must consult with an affected state before

determining appropriate remedial action. And, in § 104(c)(3), Congress mandated a minimum level of state participation as a prerequisite to receiving federal funds. To qualify for federal cleanup dollars states must formally guarantee, by contract or cooperative agreement, to provide (1) all future maintenance of removal and remedial actions; (2) the availability of a hazardous waste disposal facility for the off-site storage or treatment of hazardous substances, and (3) payment of 10% or more of the total cost of remedial operations. The state share of cleanup expenses can escalate to 50% or more if the site of the release is owned by the state itself or a political subdivision thereof. *Id.* Moreover, § 104(d)(1) encourages states to become official response authorities when they can demonstrate that they have the technical capability necessary to effect the purposes of the act. Under this section states undertake the initiation and upfront financing of remedial work and then apply to super fund for reimbursement of "reasonable response costs." *Id.* See, also, § 105 (directs the Federal Government to adopt a National Contingency Plan setting forth federal and state responsibilities under super fund and establishing criteria for determining priorities [with state input] among hazardous substance releases throughout the United States); § 111(f) (Federal Government permitted to delegate authority to state officials to obligate super fund monies where a state has replaced the Federal Government as a response authority); § 112 (Federal Government authorized to use state agencies to implement super fund claims procedure), and § 114(a) (states permitted to impose any liability in addition to that contained in super fund with respect to the release of hazardous substances within its borders).

[1, 2] It is fundamental that where a state statute conflicts with a federal statute which has preempted the field and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Supremacy Clause of the United States Constitution mandates that the state

statute must fail. *Maryland v. Louisiana,* 451 *U.S.* 725, 101 *S.Ct.* 2114, 68 *L.Ed.*2d 576 (1981); *Chicago and North Western Transp. Co. v Kalo Brick & Tile Co.,* 450 *U.S.* 311, 101 *S.Ct.* 1124, 67 *L.Ed.*2d 258 (1981); *Arizona v. Snead,* 441 *U.S.* 141, 146, 99 *S.Ct.* 1629, 1632, 60 *L.Ed.*2d 106, 111 (1979); *Mobil Oil Corp. v. Tully,* 653 *F.*2d 497 (Emerg.Ct.App.1981); *Tennessee v. Louisville & N. R. Co.,* 478 *F.Supp.* 199, 209 (M.D.Tenn.1979); *National Carriers' Conf. Comm. v. Heffernan,* 454 *F.Supp.* 914, 915 (D.Conn.1978). Where Congress has not foreclosed the field, a state statute is nevertheless void to the extent of actual conflict with a federal statute. *Ray v. Atlantic Richfield Co.,* 435 *U.S.* 151, 158, 98 *S.Ct.* 988, 994, 55 *L.Ed.*2d 179, 188–189 (1978).

[3] The court is mindful, however, that legislative enactments are presumed to be valid, and the burden on plaintiffs of demonstrating unconstitutionality is a heavy one. *Velmohos v. Maren Engineering Corp.,* 83 *N.J.* 282, 295, 416 A.2d 372 (1980); *North Jersey Suburbanite Co., Inc. v. State,* 154 *N.J.Super.* 126, 129, 381 *A.*2d 34 (App.Div.1977); *English v. Newark Housing Auth.,* 138 *N.J. Super.* 425, 431, 351 *A.*2d 368 (App.Div.1976). Furthermore, the court is conscious of its duty to construe a statute to render it constitutional if the enactment is reasonably susceptible to such interpretation, even though the statute may also be open to a construction which would render it unconstitutional or permit its unconstitutional application. *State v. Profaci,* 56 *N.J.* 346, 349, 266, *A.*2d 579 (1970); *State v. Negron,* 118 *N.J.Super.* 320, 323, 287 *A.*2d 461 (App.Div.1972). *See, also, N.J. Chamber of Commerce v. N.J. Election Law Enforce. Comm'n,* 82 *N.J.* 57, 75, 411 *A.*2d 168 (1980). Additionally, with reference to preemption, the court recognizes that it must attempt to harmonize state and federal laws whenever possible, particularly in areas traditionally reserved to the states and which relate to the vital interests of state citizens. *Florida Lime and Avocado Growers v. Paul,* 373

U.S. 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248 (1963); *Huron Cement Co. v. Detroit,* 362 *U.S.* 440, 443, 80 *S.Ct.* 813, 815, 4 *L.Ed.*2d 852 (1960); *Swift & Co. v. Wickham,* 364 *F.*2d 241 (2 Cir. 1966), *cert.* den., 385 *U.S.* 1036, 87 *S.Ct.* 776, 17 *L.Ed.2d* 683 (1967); *Katharine Gibbs Sch. Inc. v. F. T. C.,* 612 *F.*2d 658, 667 (2 Cir. 1979). Thus, the state act should not be set aside unless the court finds that § 114(c) permits no other conclusion; that the Congress has unmistakably ordained that super fund be the sole recipient of industry tax dollars where the *purposes* of the two acts are identical.

[4] The specific subject of inquiry is that portion of § 114(c) which states:

> . . . [N]o person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title.

The pivotal language is "may be compensated" and particularly the word "may". Plaintiffs contend that the phrase is clear and unambiguous and that under the "plain meaning" rule of statutory construction "may" must be employed in its usual literal permissive sense. Accordingly, plaintiffs argue that the sole function of a court is to interpret the statute according to its terms without the aid of extrinsic evidence. The State maintains that § 114(c) is unclear in certain respects, particularly when viewed in the light of the spirit of federal-state cooperation as evidenced by the language of super fund itself, and the impact that a strict and literal interpretation (as contended for by plaintiffs) would have on spill fund which contains far broader substantive coverage and liability provisions than does super fund. In short, the State argues that Congress intended that "may" whould be interpreted in a mandatory sense—an interpretation that, in effect, would substitute "shall be compensated" or "shall have been compensated" for "may be compensated." To ascertain that Congressional intent, the State claims that resort must be had to extrinsic aids.

Plaintiffs further argue that the State's interpretation would violate a second fundamental rule of construction which requires that, if possible, effect must be given to every word, clause or sentence of a statute; that a statute must be construed so that no part is made inoperative, redundant or superfluous. *Colautti v. Franklin,* 439 *U.S.* 379, 392, 99 *S.Ct.* 675, 684, 58 *L.Ed.*2d 596, 607 (1979); *U.S. v. Palmeri,* 630 *F.*2d 192, 199 (3 Cir. 1980); *Abbotts Dairies v. Armstrong,* 14 *N.J.* 319, 327, 102 *A.*2d 372 (1954); *Peper v. Princeton Univ. Bd. of Trustees,* 77 *N.J.* 55, 68, 389 *A.*2d 465 (1978); 2A *Sutherland, Statutory Construction* (3 ed. 1973), § 46.06. The State's interpretation, according to plaintiffs, amounts to a prohibition against double compensation and thus would be redundant of § 114(b) which states:

> Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.

Next, taxpayers claim that such interpretation would nullify the Congressional intent found in the latter portion of § 114(c) which provides that the clause does not preclude a state from using general revenue for duplicate spending or from using taxpayers' contributions for the additional purposes set forth therein. If the State could continue to collect an industry tax for any and all purposes, with the only limitation being payments on claims paid by super fund, plaintiffs assert that the provision concerning the use of general revenue would be purposeless. The

court disagrees with the foregoing and finds that, when read and understood in proper context, the State's interpretation does not render the questioned provisions of super fund inconsistent, redundant, superfluous or meaningless.

The court finds that the pertinent language of § 114(c), does not, by itself, convey that clear, unambiguous meaning attributed to it by plaintiffs—a conclusion that is highlighted when it is read in conjunction with the balance of the super fund act. The seemingly simple, but often misused and misapplied word "may," is anything but unambiguous. The word "may" is often subject to differing meanings when used in statutory construction. Supporting the dual function of the word are the comments of the court in *Kraft v. Board of Ed. for Dist. of Columbia,* 247 *F.Supp.* 21, 24–25 (D.C.D.C.1965), *cert.* den., 386 *U.S.* 958, 87 *S.Ct.* 1026, 18 *L.Ed.*2d 106 (1967), where it was stated:

> It is well established, however, that the word "may" can be at times contrued to mean "shall", just as the word "shall" may be construed to mean "may". The interpretation of those words dependes upon the context in which they are used and the intention of the legislative body as is shown by the statute as may be gleaned from committee reports and similar authoritative sources. [247 *F.Supp.* at 24–25]

Accord, Bell v. Western Employer's Ins. Co., 173 *N.J.Super.* 60, 65, 413 *A.*2d 363 (App.Div.1980); *MacNeil v. Klein,* 141 *N.J.Super.* 394, 358 *A.*2d 488 (App.Div.1976). In light of the ambiguity of the meaning of "may", and in view of the contradictory interpretations which have been voiced as to the interpretation of § 114(c) by both parties, it is essential that this court look to extrinsic aids to clarify the legislative scheme underlying the statutory language. Furthermore, this inquiry requires a consideration of the relationship between the federal and state laws as they are to be *applied,* not merely as they are *written.*

[5] Reference to legislative history is appropriate not only where the statutory language is ambiguous but also where a literal interpretation would thwart the overall statutory scheme. *International T & T Corp. v. General T. & E. Corp.,* 518 *F.*2d 913, 921 (9 Cir. 1975). It is to determine that overall statutory scheme that not only must the legislative history of the statute be examined but attention must also be given to the practical effects of each proffered interpretation. In such a circumstance the New Jersey Supreme Court, in *N.J. Pharmaceutical Ass'n. v. Furman,* 33 *N.J.* 121, 162 *A.*2d 839 (1960), stated:

> Courts may, or course, freely refer to legislative history and contemporaneous construction for whatever aid they may furnish in ascertaining the true intent of the legislation. [at 130, 162 *A.*2d 839.]

Consequently, no rule of statutory construction should be permitted to block consideration of any legislative history which could be of aid to the court. *See id.; In Re Meadowlands Communication Systems, Inc.,* 175 *N.J.Super.* 53, 65, 417 *A.*2d 575 (App.Div.1980), certif. den., 85 *N.J.* 455, 427 *A.*2d 556 (1980); *Marsh v. Finley,* 160 *N.J.Super.* 193, 197, 389 *A.*2d 490 (App.Div.1978), certif. den., 78 *N.J.* 396, 396 *A.*2d 583 (1978); *State v. Moody,* 169 *N.J.Super.* 177, 404 *A.*2d 370 (Law Div. 1978). *See, also, San-Lan Builders, Inc. v. Baxendale,* 28 *N.J.* 148, 155, 145 *A.*2d 457 (1958), where the court counseled that "Scholastic strictness is to be avoided in the search for the legislative intention."

[6] At the outset it is readily apparent that § 114(c) does not preempt *the field* from state participation. By its history and very terms super fund seeks and provides for state participation as partners in the fight against pollution. As such, § 114(c) is not really a preemption clause as that term is classically used. The clause addresses "taxing" and not "participation." Therefore, the initial determination to be made is whether spill

fund imposes a double tax on plaintiffs in light of §114(c) of super fund.[7]

The enactment of super fund in 1980 was a compromise and was preceded by extensive studies and hearings by the Committee on Environment and Public Works concerning various predecessor measures (never adopted) and was accompanied by extensive floor debate. Particularly enlightening are the remarks of Senator Randolph concerning preemption during the Senate floor debate on super fund.[8]

> Mr. President, let me state categorically that there is nothing in this bill that affects the uses to which a state may put the existing cleanup fund. This bill is silent on the subject. Thus a state may, after enactment of this bill, continue to spend its existing funds for any purpose that is lawful under state law.
>
> If, after enactment of this bill, a state continued to pay claims from a state fund, that would not be contrary to any provi-

[7] Preemption aside, neither party addressed the question of whether the spill fund taxing scheme is constitutionally prohibited. Plaintiffs relied on the provisions of § 114(c) as the sole support for their position.

[8] The Randolph remarks in particular are entitled to great weight in interpreting the preemption provision because Senator Randolph was the chairman of the Committee on Environment and Public Works which reported the super fund bill to the Senate, was floor manager and a cosponsor of the measur e, and was clearly involved in the last-minute negotiations leadiing up to the passage of the act. *See, generally,* 126 Cong. Rec. S. 14941–S. 15008 (daily ed. November 24, 1980). In *FEA v. Algonquin SNG, Inc.*, 426 *U. S.* 548, 564, 96 *S.Ct.* 2295, 2304, 49 *L.Ed.*2d 49 (1976), the Supreme Court relied upon Senate floor debates for support in statutory construction and observed in relation to a particular excerpt from a debate that, "as a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Accord. Schwegmann Bros. v. Calvert Corp.*, 341 *U.S.* 384, 394, 71 *S.Ct.* 745, 750, 95 *L.Ed.* 1035 (1951); *United States v. Oates*, 560 *F.*2d 45 (2 Cir. 1977); *International T & T Corp. v. General T. & E. Corp.*, 518 *F.*2d 913, 921 (9 Cir. 1975); 2A *Sutherland, Statutory Construction, op.* cit. § 48.04 at 197–198 and § 48.14 at 217–220.

> sion of this bill. *What this bill does is prohibit a state from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill . . .*
>
> Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a state may make of its money, nor does it prohibit a state from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.
>
> In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation. [126 *Cong.Rec.* S. 14981 (daily ed., November 24, 1980); emphasis supplied]

Moreover, at the end of the colloquy, the following question by Senator Bradley (of New Jersey) elucidated Senator Randolph's position:

> Mr. Bradley: Finally, if the federal government determines that the needs at other sites require that federal efforts be terminated at the first site before that site is completed, may a state fund complete the effort?
>
> Mr. Randolph: This legislation would permit that to happen. *[Id.]*

[7] These remarks can only have been intended to mean that a state can tax local industries to support a fund dedicated to the purpose of compensating claims and costs not actually paid by super fund. Furthermore, any attempt to limit Senator Randolph's remarks to the use of state-collected taxes prior to the effective date of super fund is unfounded in view of the

following statements which clearly were directed to the use of state funds obtained after super fund implementation:

> Mr. Bradley: Am I correct in assuming that monies expended by state funds can be used to provide the required 10 percent state match?
>
> Mr. Randolph: That is correct.
>
> Mr. Bradley: And am I also correct in noting that *state funds are preempted only for efforts which are in fact paid for by the federal fund and that there would be no preemption for efforts which are eligible for federal funds but for which there is no reimbursement?*
>
> Mr. Randolph: *That is correct.* [126 *Cong. Rec.* S. 14981 (daily ed. November 24, 1980); emphasis supplied]

The Randolph interpretation, which would enable states to tax for remedial actions not actually compensated under super fund, comports with a prohibition against double taxation in that states are still prevented from taxing to pay for cleanups actually financed by the Federal Government. Consequently, plaintiffs would not be put in the position of paying twice for the same activity. Based on this interpretation, New Jersey's tax covering hazardous waste cleanups could simply by adjusted to reflect the infusion of federal funds pursuant to super fund. If super fund monies result in a reduction of the state's spending requirements, that reduction can simply be reflected in a decrease in the imposition of state taxes.

In that regard the additional comments of Senator Randolph in response to a question from Senator Bradley are pertinent:

> Mr. Bradley: In the event I have described, where a state or a contractor of the state is the respondent to the release and incurs economic loss normally compensable under the provisions of this bill, does this legislation intend that a state that has continued to collect taxes or fees to finance a state fund designed to

> cover expenses and economic loss not covered under the provision of this bill have the right to use those state fund monies to provide intermediate, up front capital to pay for these activities and seek reimbursement from the fund established under this bill?
>
> Mr. Randolph: Nothing in the language or intent of this bill would prohibit a state from using its fund for the purposes you have inquired about. The purpose of this legislation is simply to preempt double taxation of the substances enumerated in the bill for the purposes of compensation of the *covered* damages. The situation described in your inquiry is a question of *bookkeeping* rather than a subject or preemption. The expenditures by a state from its fund are temporary in nature and would be reimbursed and therefore ultimately paid from the fund established in this legislation. [126 *Cong. Rec.* S. 14981 (daily ed., November 24, 1980), emphasis supplied]

[8] It is important to note that spill fund, as presently constituted, does protect industry from any threat that New Jersey would stockpile spill tax revenues. Spill fund limits the annual amount of revenue that can be collected, *N.J.S.A.* 58:10–23.11h(b), and also provides that the tax will be suspended in the event that the balance in spill fund equals or exceeds $50,000,000. *Id.*

The court also endorses the Randolph interpretation of preemption because that interpretation coincides with the overriding remedial purpose of super fund. *See San-Lan Builders, Inc. v. Baxendale, supra,* which stands for the proposition that the policy and purpose of enactment as a whole is to be used in interpreting specific statutory language in accord with legislative intent. *Accord, N.J. Builders, Owners and Managers Ass'n v. Blair, 60 N.J.* 330, 338, 288 A.2d 855 (1972). If § 114(c) is read to preempt all state taxation for hazardous waste cleanups, the clause would undermine the salutary statutory goals of super fund and would result in actually limiting the number of cleanups which could otherwise be initiated by the state in spite of the fact that super fund was intended to expand cleanup efforts.

A permissive construction of the word "may" would also do violence to the Congressional intent in light of the practicalities of the overall problem and the conditions existing at the time of the passage of super fund. The word "may" is often used similarly to "can," "could," "to be able." It is further used in the sense of "implying power or ability or possibility with a contingency." See *Webster's New Collegiate Dictionary* (1979). In attributing any of these meanings to the term the obvious conclusion is that a state cannot collect a tax if its purpose is to pay a claim or cost which *can, could* or *may possibly be paid* by the Federal Government (assuming approval is given). This interpretation defies logic and common sense when viewed in light of super fund's dependency on state participation to accomplish its goals, its own limitations and the purposes of both acts.

[9] With respect to dependency it has already been noted that, in the adoption of super fund, Congress implicitly acknowledged that direct state action is necessary to assure adequate response action to spills. See §§ 104(c)(2), 104(c)(3), 104(d)(1), 111(f), 112, 114(a). Clearly, therefore, Congress envisioned active state financial, technical and administrative support as an integral part of the overall effort to combat the pollution problem. Under these circumstances it is unrealistic to assume that it was the intent of Congress to prohibit states from collecting and using industry contributions simply because a state may expend those funds on a cleanup program which *may be* a target for super fund expenditures. If a state is prohibited from collecting such funds from a source found by the State Legislature to be the most equitable—a finding which was shared by Congress in enacting super fund—for use in response actions which may also be eligible but which may never be declared eligible or paid under super fund, a state is faced with either abandoning many

containment, cleanup and remedial programs or transferring a tremendous burden to its citizens.[9]

Concerning its limitations it was also recognized by members of Congress that the funding level established in super fund is insufficient to address the magnitude of the problem. See 126 *Cong. Rec.* S. 15007 (daily ed. November 24, 1980) (remarks of Senator Stafford); S. Rep. No. 848, 96th Cong.2d Sess. at 17 and 71. Since super fund allocates only $1.6 billion over a five-year period to remedy hazardous waste sites and spills throughout the 50 states, it is clear that only a small part of the overall cleanup problem can be addressed through the federal legislation. This is especially true when the $1.6 billion is compared to the $4.1 billion originally proposed and the 1979 EPA estimate that it could cost as much as $22.1 billion to clean up all known abandoned hazardous waste sites, to say nothing of emergency spills. See S. Rep. No. 848, 96th Cong., 2d Sess. at 17; H. R. Rep. No. 96–1016, 96th Cong. 2d. Sess. at 20, reprinted in [1980] *U.S. Code Cong. & Ad. News* 6119, 6123.

In further recognition of these funding limits Congress directed the Federal Government to promulgate a National Contingency Plan within 180 days after the enactment of super fund to institute a priority system to govern federal funding. The act directs that the National Contingency Plan contain "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action." § 105(8)(A). This section also provides that

[9] Senator Bradley noted that in New Jersey there are at least 235 known hazardous waste sites requiring attention. 126 *Cong. Rec.* S. 14971 (daily ed. November 24, 1980). The Environmental Protection Association has published a list of priority hazardous waste sites throughout the nation; only 12 of New Jersey's 235 sites qualified for priority treatment under that list.

such criteria be based upon relative risk or danger to the public health and such other factors. *Id.*; see also, § 105(8)(B). This direction and criteria clearly indicate that Congress was aware that super fund, as designed and funded, can reach only "top priority" sites.

Where sites or spills do not satisfy either the general priority criteria set forth in § 105 or the specific priority criteria yet to be adopted in the National Contingency Plan, a state must be permitted to rely on its own industry supported fund to remedy the situation. It simply strains credulity to say that hazardous waste sites or spills not meeting the criteria are claims which "may be compensated" under super fund. Only the future will tell whether such unqualified sites are large or small, many or few, but what is certain is that the adoption of plaintiffs' interpretation of § 114(c) will leave untouched, at the very least, some problem areas—a result which is clearly contrary to the scope and purpose of both super fund and spill fund.

The mere possibility that the tax paid to two governmental entities will be used for identical purposes must be distinguished from those situations wherein identical expenditure must necessarily arise. Neither the express language of super fund nor its criteria (in the absence of a National Contingency Plan it cannot be said that any specific criteria exist) demands the conclusion that there ever will be such a head-on collision of identical expenditures of the tax monies. A mere possibility of double taxation should not be deemed sufficient to extinguish a state's right to collect a tax such as is in question here. Plaintiffs' reliance on an argument that there could be—not that there must be—expenditures for identical purposes misapprehends the nature of the doctrine of preemption. A mere potential expenditure which may be made in the future will not invalidate state authority. More than mere generalizations or speculative

expenditures is required for a court to stifle a state's right to collect this tax.

There is also force to this position when one recognizes that the Environmental Protection Agency's cost estimates do not include the cost of cleaning up hazardous substance pollution from sources other than dump sites, such as accidental spills or discharges. See H.R.Rep.No.96-1016, 96th Cong., 2d Sess., reprinted in [1980] *U.S. Code Cong. & Ad.News* 6139 (comments of Representative Gore to the effect that $600 million would cover the cleanup on only approximately 70 sites out of the thousands that urgently need attention). See, generally, 126 *Cong.Rec.* S. 15007 (daily ed., November 24, 1980) (remarks of Senator Stafford); *id.* at S. 14972 (remarks of Senator Tsongas). Obviously, in the case of emergency, where accidental spills are not within the effective exercise or active range of federal administration, the Congress must content itself to allow the states to use industry tax funds. The ability to use such funds to make such expenditures is critical to a state which must be able to move without delay when volatile situations arise. To forbid a state from raising tax money altogether for hazardous substance cleanups and to depend strictly on general revenues for funding would effectively disable a state from responding to emergency situations. It cannot be said the Congress would deprive the states of a primary source of funds for the purposes of combating situations over which the Federal Government neither chooses to nor, as a practical matter, could control. A contrary conclusion would be inconsistent with a proper regard for the interplay of state and national interests.

[10] The scheme of super fund is one which allows, but does not require, cooperation of the federal and state regimes. If a state chooses, or if the Federal Government through disapproval of a state request requires it, to take either the lead or the entire financial responsibility of cleaning up a specific spill prob-

lem, it should be free to use an industry supported fund to do so. In such instances the possiblity that the financial burden on a state is greater than it may have been had the Federal Government done the cleanup work can afford plaintiffs no comfort in their arguments against the constutionality of the state tax. Additionally, it is noted that the question is not before this court.

Against this background the court finds that § 114(c) of super fund does not preempt the State of New Jersey from collecting a spill tax to be used to pay hazardous waste cleanup costs and related claims not covered or actually compensated under super fund.

While this finding effectively disposes of plaintiffs' claim, the court finds that there exists another, and equally compelling, reason why plaintiffs' motion must be denied. Even if it were found that industry-supported tax monies could not be collected for general containment, cleanup and remedial purposes, the spill fund law nevertheless encompasses many other areas to which such monies could be devoted which are clearly outside the reach of § 114(c) and which may very well be of sufficient magnitude to sustain the spill fund tax. As noted earlier, plaintiffs' sole attack against spill fund is based on the preemption provisions of § 114(c). Except for the federal Supremacy Clause argument based on § 114(c), plaintiffs neither raised nor attempted to support any argument that the taxing provisions of spill fund were violative of any other constitutional rights. Thus, plaintiffs do not suggest that there is an actual conflict between the limited purposes of super fund and the overall policy enunciated by New Jersey in spill fund. Indeed, it may be said that the complete enforcement of the state act might well effectuate the policy of the federal statute.

[11] It is noted first that § 114(c) explicitly exempts from its provisions a state tax on the petrochemical industries in order to finance (1) the purchase of hazardous response equipment,

(2) the prepositioning of such response equipment and (3) other preparations for the response to a release of hazardous substances. Spill fund specifically authorizes such use of its fund monies. *N.J.S.A.* 58:10–23.11*o*(4). Clearly, the spill fund tax is valid in so far as such monies are used to satisfy these purposes.

That these categories do not represent the exclusive purposes to which spill fund tax monies may be devoted is disclosed by a comparison of the coverage of the two acts. It is first noted that super fund, by its very definition of hazardous substance and pollutant and/or contaminant, excludes petroleum and crude oil. § 101. Compare *N.J.S.A.* 58:10–23.11b(k). Petroleum spills, not being compensable under super fund, it is clear that the spill fund tax may be collected and used to pay such claims—an additional nonpreempted use of tax revenues which is authorized by the New Jersey Act.

[12, 13] Similarly, super fund makes no provision for the compensation of nongovernmental, third-party damage claims. *N.J.S.A.* 58:10–23.11g(a)(1) makes spill fund liable for all such direct and indirect damages caused by a discharge of hazardous substances. Accordingly, such claims are within the scope of proper spill fund spending under § 114(c).

Additionally, spill fund authorizes payments for income or property value losses caused by damage resulting from a discharge of hazardous substances. Furthermore, spill fund covers the cost of restoration or replacement of natural resources damaged or destroyed by a discharge. Conversely, super fund provides limited damage coverage in relation to natural resources and authorizes such compensation only if the release occurred after December 11, 1980 and only if the claimants are the United States or a state. Compare §§ 107(a)(4)(A), 107(f), 111(c)(2), and 111(d)(1) with *N.J.S.A.* 58:10–23.11g(a). Furthermore, super fund does not explicitly cover state fund administrative expenses and clearly does not support spill fund admin-

istrative costs relating to petroleum spills, the reimbursement of third-party damage claims, and other claims not compensable under the federal act. Accordingly, these expenditures are also proper objects of spill fund spending.

Additionally, § 104(c)(3) of super fund specifically provides that a state must contribute 10% or more "of the costs of remedial action including all future maintenance," in order to qualify for federal funding. This expenditure obviously represents a cost or claim which cannot be compensated by super fund and accordingly is beyond the preemptive scope of § 114(c) and thus a proper object of state taxation and spill fund spending. Additionally, a state is free to provide up-front operating dollars from its industry-supported spill fund to finance remedial activities on a temporary basis pending super fund reimbursement.

Clearly, it is evident that the foregoing areas are appropriate subjects of spill fund taxing in that they are not precluded by super fund. That conclusion is supported by the comments made by key legislators in connection with the debates surrounding the adoption of super fund, and particularly those (earlier noted) of Senator Randolph. See 126 *Cong.Rec.*S. 14981 (daily ed., November 24, 1980) (remarks of Senators Bradley and Randolph). The remarks by these legislators clearly indicate that industry-supported state funds may be used to pay for costs associated with releases of hazardous substances which are not covered by super fund.

Plaintiffs argue, however, that these nonpreempted areas are peripheral in nature and cannot be severed from the overriding purposes of the state act, *i.e.*, cleanup and removal costs of spills. According to plaintiffs, there exists no possibility that the State Legislature could have intended the tax to remain in effect if the principal object—cleanup and removal costs—is deleted from the State's operation.

Spill fund (*N.J.S.A.* 58:10–23.11w) contains a general severability clause which provides that

> If any section, subsection, provision, clause or portion of this act is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this act shall not be affected thereby.

The rule of severability was succinctly set forth in *Affiliated Distillers Brands Corp. v. Sills*, 60 *N.J.* 342, 289 *A.*2d 257 (1972):

> Severability is a question of legislative intent. That intent must be determined on the basis of whether the objectionable feature of the statute can be excised without substantial impairment of the principle object of the statute. 56 *N.J.* at 265 [266 *A.*2d 579]; *N.J. Chapter Am. I.P. v. N.J. State Board of Professional Planners*, 48 *N.J.* 581, 593 [227 *A.*2d 313] appeal dismissed and cert. denied, 389 *U.S.* 8, [88 *S.Ct.* 70, 19 *L.Ed.*2d 8] (1967); *Angermeier v. Boro of Sea Girt*, 27 *N.J.* 298, 311 [142 *A.*2d 624] (1958). To justify severance of a part of a statute "there must be such a manifest independence of the parts as to clearly indicate a legislative intention that the constitutional insufficiency of the one part would not render the remainder inoperative." *Washington National Insurance Company v. Board of Review*, 1 *N.J.* 545, 556 [64 *A.*2d 443] (1949); *Yanow v. Seven Oaks Park, Inc.*, 11 *N.J.* 341, 361 [94 *A.*2d 482] (1953) [at 345–346, 289 *A.*2d 257.]

Although plaintiffs may characterize petroleum spill cleanups as a "peripheral" purpose of spill fund, the act does not support such a conclusion in spite of the fact that in the first four years of its existence the spill fund did disburse 93% of its revenue for the cleanup and containment of nonpetroleum hazardous waste substances. That the spill fund has not incurred substantial expenses for oil spill cleanups reflects the good fortunes of New Jersey and should not be considered a diminishment of the importance of the portions of the act relating to petroleum spills.

Furthermore, the legislative findings set forth in *N.J.S.A.* 58:10-23.11a emphasize the need to protect New Jersey's coastal areas and tourist trade from oil spills:

> The Legislature finds and declares: that New Jersey's lands and waters constitute a unique and delicately balanced resource; that the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; that the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State; that the State is the trustee, for the benefit of its citizens, of all natural resources within its jursdiction; and that the storage and transfer of petroleum products and other hazardous substances between vessels, between facilities and vessels, and between facilities, whether onshore or offshore, is a hazardous undertaking and imposes risks of damage to persons and property within this State.
>
> The Legislature finds and declares that the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge.

Only the future will tell whether spill fund spending scales will continue to be balanced in favor of nonpetroleum spill requirements.

[14] Additionally, spill fund itself indicates a legislative recognition that the statute should be read in conjunction with other laws and should survive federal entrance into the hazardous waste cleanup field. In recognition of the possible entry of

the Federal Government into the field, *N.J.S.A.* 58:10–23.11z provides:

> If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the Commissioner shall determine to what degree that legislation shall provide for the needed protection for our citizens, businesses and environment and shall make the appropriate recommendation to the legislature for amendments to this Act.

Such provision evinces a legislative intent that every purpose of spill fund was to be accomplished.

Moreover, the Legislature specifically envisioned that the spill act would be enforced in conjunction with any other applicable law. In *N.J.S.A.* 58:10–23.11v the Legislature specifically provided that

> Nothing in this act shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person. The remedies provided in this act are in addition to those provided by existing statutory or common law, but no person who receives compensation for damages or cleanup costs pursuant to any other State or Federal law shall be permitted to receive compensation for the same damages or cleanup costs under this act.

Under the statute as presently written, then, the spill act must be administered in conjunction with, and supplementary to, any federal programs in the hazardous waste area.

In view of the foregoing the court finds that even if § 114(c) of super fund could be construed to preempt part of spill fund, the aforementioned nonpreempted areas are more than sufficient to sustain its continued validity. The underlying intent of spill fund simply indicates that the level of dependence between the alleged preempted and admitted nonpreempted areas that is necessary for this court to find the whole scheme

inseparable is not present. *Affiliated Distillers Brands Corp. v. Sills, supra.*

The court finds that Congress, through the adoption of super fund, has not put an end to the taxing powers of the states for hazardous substance cleanup, containment and remedial purposes by putting another tax in its place. Rather, the court finds that super fund permits a state to continue to avail itself of industry tax funds with the obvious limitation that a double tax could not be collected and expended on any one project. Such would be the practicalities of government where both state and nation have the same and yet separate, identifiable interests. Such can be the only conclusion unless Congress leaves no doubt that the Federal Government is to be the sole recipient of the tax monies needed to effectuate such purposes so as to leave no room for concert. No such finding can be made here. This court believes that Congress has not preempted the right of states to protect their residents' pocketbooks as well as their environment.

The third and fouth counts of Docket SC 319A–81TC survive judgment and will proceed to trial.[10] The Clerk of the Tax Court will enter judgments dismissing Docket SC 303A–81 in its entirety and Docket SC 319A–81TC as to counts one and two.

[10] In the third count of their complaint plaintiffs seek relief from payment of an alleged disproportionate share of the spill fund tax. In the fourth count plaintiffs demand judgment directing the Commissioner of the Department of Environmental Protection to make recommendations to the New Jersey Legislature for amendments to spill fund pursuant to *N.J.S.A.* 58:10–23.11z.

The Tax Court of New Jersey

DOCKET NO. SC 303A-81
SC319A-81TC

Civil Action

JUDGMENT

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Plaintiffs,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; and THE STATE OF NEW JERSEY,

Defendants.

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Plaintiffs,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection; and THE STATE OF NEW JERSEY,

Defendants.

Complaints having been filed with the Tax Court of New Jersey and the parties having filed cross-motions for summary judgment, and the court having considered the arguments and evidence presented by or on behalf of the parties, and having denied plaintiffs' motion and granted defendants' motion, it is

ORDERED AND ADJUDGED that docket number SC 303A-81 be and is hereby dismissed and docket number SC 319A-81TC as to counts one and two be and is hereby dismissed.

/s/ D. Jean Hancikovsky
D. JEAN HANCIKOVSKY,
Acting Clerk
Tax Court of New Jersey

ENTERED: April 23, 1982
X-11-30-81-6-JE

Filed November 19, 1984
Supreme Court of New Jersey

IN THE

Supreme Court of New Jersey

DOCKET NO. 21,567

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,
Plaintiffs-Appellants,

v.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation, JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,
Defendants-Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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TO: ROBERT HUNT
Administrator of New Jersey Spill Compensation Fund
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KENNETH R. BIEDERMAN
Treasurer of the State of New Jersey
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ROBERT E. HUGHEY
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IRWIN I. KIMMELMAN, Attorney General of New Jersey
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SIRS:

NOTICE IS HEREBY GIVEN that Exxon Corporation, The BFGoodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc., the Plaintiffs-Appellants above named, hereby appeal to the Supreme Court of the United States from the final Order of the Supreme Court of the State of New Jersey affirming the constitutionality of the New Jersey Spill Compensation and Control Act, entered herein on September 19, 1984.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

FARRELL, CURTIS, CARLIN & DAVIDSON

By /s/ JOHN J. CARLIN, JR.
John J. Carlin, Jr.
Attorneys for Plaintiffs-Appellants

CERTIFICATION OF SERVICE

We hereby certify that copies of the within Notice of Appeal were served on Robert Hunt, Administrator of the New Jersey Spill Compensation Fund; Kenneth R. Biederman, Treasurer of the State of New Jersey; Robert E. Hughey, Commissioner of Environmental Protection; John R. Baldwin, Director of the Division of Taxation; and Irwin I. Kimmelman, Attorney General of the State of New Jersey pursuant to Rule 28(5) of the United States Supreme Court by certified mail, return receipt requested on November 19, 1984.

FARRELL, CURTIS, CARLIN & DAVIDSON

By /s/ JOHN J. CARLIN, JR.
John J. Carlin, Jr.

58:10–23.11f Discharge of hazardous substance; removal and cleanup; discharge of detergent; approval of administrator; funds and payment for removal; private residential wells; payments for restoration, replacement or alternative water supply

a. Whenever any hazardous substance is discharged, the department may, in its discretion act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge. Any discharger who fails to comply with such a directive shall be liable to the department in an amount equal to three times the cost of such removal.

Removal of hazardous substances and actions to minimize damage from discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan for removal of oil and hazardous substances established pursuant to section 311(c)(2) of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500, 33 U.S.C. 1251 et seq.).

Whenever the department acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw the money available in the fund. Such moneys shall be used to pay promptly for all cleanup costs incurred by the department in removing or in minimizing damage caused by such discharge.

Nothing in this section is intended to preclude removal and cleanup operations by any person threatened by such discharges, provided such persons coordinate and obtain approval for such ongoing State or Federal operations. No action taken by any person to contain or remove a discharge shall be construed as an admission of liability for said discharge. No person who renders assistance in continuing or removing a discharge shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance except for acts or omissions of gross negligence or willful misconduct. In the course of cleanup operations, no person shall discharge any detergent into the waters of this State without prior authorization of the commissioner.

b. Notwithstanding any other provisions of P.L.1976, c. 141 (C. 58:10–23.11 et seq.), the department, after notifying the administrator and subject to the approval of the administrator with regard to the availability of funds therefor, may remove or arrange for the removal of any hazardous substance which:

(1) Has not been discharged from a grounded or disabled vessel if the department determines that such removal is necessary to prevent an imminent discharge of such hazardous substance;

(2) Has not been discharged if the department determines that such substance is not satisfactorily stored or contained and said substance possesses any one or more of the following characteristics:

(a) explosiveness;

(b) high flammability;

(c) radioactivity;

(d) chemical properties which in combination with any discharged hazardous substance at the same storage facility would create a substantial risk of imminent damage to public health or safety or an imminent and severe damage to the environment;

(e) is stored in a container from which its discharge is imminent as a result of contact with a hazardous substance which has already been discharged and such additional discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment; or

(f) high toxicity and is stored or being transported in a container or motor vehicle, truck, railcar or other mechanized conveyance from which its discharge is imminent as a result of the significant deterioration or the precarious location of the container, motor vehicle, truck, railcar or other mechanized conveyance, and such discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment; or

(3) Has been discharged prior to the effective date of the act to which this act is amendatory, if such discharge poses a substantial risk of imminent damage to the public health or safety or imminent and severe damage to the environment.

c. If and to the extent that he determines that funds are available, the administrator shall approve and make payments for any cleanup and removal costs incurred by the department for the removal of a hazardous substance other than petroleum as authorized by subsection b. of this section; provided that in determining the availability of funds, the administrator shall not include as available funds revenues realized or to be realized from the tax on the transfer of petroleum to the extent that such revenues result from a tax levied at a rate in excess of $0.-01 per barrel, pursuant to subsection 9b. of the act to which this act is amendatory, unless the administrator determines that the sum of claims paid by the fund on behalf of petroleum discharges or removals plus pending reasonable claims against the fund on behalf of petroleum discharges or removals is greater than 30% of the sum of all claims paid by the fund plus all pending, reasonable claims against the fund.

d. The administrator may only approve and make payments for any cleanup and removal costs incurred by the department for the removal of a hazardous substance discharged prior to the effective date of the act to which this act is amendatory, pursuant to subsection b. of this section, if, and to the extent that, he determines that adequate funds from another source are not or will not be available; and further provided, with regard to the cleanup and removal costs incurred for discharges which occurred prior to the effective date of the act which this act is amendatory, the administrator may not during any 1 year period pay more than $3,000,000.00 in total or more than $1,500,000.00 for any discharge or related set or series of discharges.

e. Notwithstanding any other provisions of P.L.1976, c. 141, the administrator, upon the approval of the department after considering, among any other relevant factors, its priorities for spending funds pursuant to P.L.1976, c. 141, and within the limits of available funds, shall make payments for the restoration or replacement of, or connection to an alternative water supply for, any private residential well destroyed, contaminated, or impaired as a result of a discharge prior to the effective date of P.L.1976, c. 141, provided, however total payments for said purpose shall not exceed $500,000.00 for the period between the effective date of the subsection (e) and January 1, 1983, and in any calendar year thereafter.

(f) Any expenditures made by the administrator pursuant to this act shall constitute a first priority claim and lien paramount to all other claims and liens upon the revenues and all real and personal property of the discharger, whether or not the discharger is insolvent.

L.1976, c. 141, § 7. Amended by L.1979, c. 346, § 4; L.1981, c. 25, § 1, eff. Feb. 9, 1981.

58:10–23.11g Liabilites for cleanup and removal costs and direct and indirect damages

a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:

(1) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, or repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(3) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds 10% of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(4) Loss of tax revenue by the State or local governments for a period of 1 year due to damage to real or personal property proximately resulting from a discharge;

(5) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this act.

b. The damages which may be recovered by the fund, without regard to fault, subject to the defenses enumerated in subsection d. of this section against the owner or operator of a major facility or vessel, shall not exceed $50,000,000.00 for each major facility or $150.00 per gross ton for each vessel, except that such maximum limitation shall not apply and the owner or operator shall be liable, jointly and severally, for the full amount of such damages if it can be shown that such discharge was the result of (1) gross negligence or willful misconduct, within the knowledge or privity of the owner, operator or person in charge, or (2) a gross or willful violation of applicable safety, construction or operating standards or regulations. Damages which may be recovered from, or by, any other person shall be limited to those authorized by common or statutory law.

c. Any person who has discharged a hazardous substance or is in any way responsbile for any hazardous substance which the department has removed or is removing pursuant to subsec-

tion b. of section 7 of this act shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.

d. An act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act.

L.1976, c. 141, § 8. Amended by L.1979, c. 346, § 5.

N.J.S.A. 58:10-23.11h

TAXATION OF MAJOR FACILITIES; RATE; REFUND OR CREDIT; CLAIMS EXCEEDING FUND BALANCE; FAILURE TO FILE OR PAY TAX

a. There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee; provided, however, that in the case of a major facility which operates as a public storage terminal for hazardous substances owned by others, the owner of the hazardous substance transferred to such major facility or his authorized agent shall be considered to be the transferee or transferor, as the case may be, for the purposes of this section and shall be deemed to be a taxpayer for purposes of this act. Where such person has failed to file a return or pay the tax imposed by this act within 60 days after the due date thereof, the director shall forthwith take appropriate steps to collect same from the owner of the hazardous substance. In the event the director is not successful in collecting said tax then on notice to the owner or operator of the public storage terminal of said fact said owner or operator shall not release any hazardous substance owned by the taxpayer. The director may forthwith proceed to satisfy any tax liability of the taxpayer by seizing, selling or otherwise disposing of said hazardous substance to satisfy the taxpayer's tax liability and to take any further steps permitted by law for its collection. For the purposes of this act

public storage terminal shall mean a public or privately owned major facility operated for public use which is used for the storage or transfer of hazardous substances. The tax shall be measured by the number of barrels or the fair market value, as the case may be, of hazardous substances transferred to the major facility, provided, however, that the same barrel, including any products derived therefrom, subject to multiple transfers from or between major facilities shall be taxed only once at the point of the first transfer.

When a hazardous substance other than petroleum which has not been previously taxed is transferred from a major in-State facility to a facility which is not a major facility, the transferor shall be liable for tax payment for said transfer.

b. The tax shall be $0.01 per barrel transferred and in the case of the transfer of hazardous substances other than petroleum or petroleum products, the tax shall be the greater of $0.01 per barrel or 0.4% of the fair market value of the product, until the balance in the fund equals or exceeds $50,000,000.00; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined, or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, the tax shall be $0.01 per barrel of the hazardous substance. For the purpose of this section, "precious metals" means gold, silver, osmium, platinum, palladium, iridium, rhodium, ruthenium and copper. In each fiscal year following any year in which the balance of the fund equals or exceeds $50,000,000.00, no tax shall be levied unless (1) the current balance in the fund is less than $40,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. The provisions of the foregoing notwithstanding, should claims paid from or pending against the fund not exceed $5,000,000.00 within 3 years after the tax is first levied, the tax shall be $0.01 per barrel transferred or 0.4% of the fair market value of the product, as the case may be, until the balance in the fund equals or exceeds $36,000,000.00, and thereafter shall not be levied unless: (1) the current balance in

the fund is less than $30,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. In the event of either such occurrence and upon certification thereof by the State Treasurer, the director shall within 10 days of the date of such certification relevy the excise tax, which shall take effect on the first day of the month following such relevy. With respect to the tax imposed upon the transfer of hazardous substances which are other than petroleum or petroleum products, if the revenues from such tax exceed $7,000,000.00 during any calendar year, such excess shall be refunded or credited to the taxpayers who paid such tax during the calendar year. The refund or credit shall be based upon the amount of taxes paid by each taxpayer on transfers of hazardous substances which are other than petroleum or petroleum products for the calendar year in proportion to all taxes paid by all taxpayers on such transfers during said year; provided, however, that if at the end of the calendar year the increased tax rate as authorized by this subsection of subsection i. is in effect, no refund or credit shall be allowed for such calendar year; and further, provided that no refund or credit shall be allowed for a calendar year if by reason of such refund or credit a condition would occur which would authorize the imposition of the tax at the higher rate authorized in this subsection or subsection i. However, a partial refund or credit shall be allowed to the extent that such a condition would not occur. In the event of a major discharge or series of discharges resulting in reasonable claims against the fund exceeding the existing balance of the fund, the tax shall be levied as follows:

(1) On petroleum or petroleum products, at the rate of $0.04 per barrel transferred, until the revenue produced by such increased rate equal 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of petroleum or petroleum products; provided, however, that such rate may be set at less than $0.04 per barrel transferred if the administrator determines that the revenue produced by such lower rate will be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy; and

(2) On hazardous substances other than petroleum or petroleum products, at the rate of the greater of $0.04 per barrel transferred or 0.8% of the fair market value of such hazardous substance, until the revenue produced by such increased rate equals 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of hazardous substances other than petroleum or petroleum products; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined, or rerefined, the tax shall be $0.04 per barrel of the hazardous substances; and provided further, however, that any such increased tax rate on hazardous substances other than petroleum or petroleum products may be set at less than $0.04 per barrel transferred, or 0.8% of the fair market value of the hazardous substance, as the case may be, if the administrator determines that the revenue produced by such lower rate shall be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy.

Interest received on moneys in the fund shall be credited to the fund. Should the fund exceed $36,000,000.00 or $50,000,000.00, as herein provided, as a result of such interest, the administrator and the commissioner shall report to the Legislature and the Governor concerning the options for the use of such interest.

c. (1) Every taxpayer and owner or operator of a public storage terminal for hazardous substances shall on or before the twentieth day of the month following the close of each tax period render a return under oath to the director on such forms as may be prescribed by the director indicating the number of barrels of hazardous substances transferred and where appropriate, the fair market value of the hazardous substances transferred to or from the major facility, and at said time the taxpayer shall pay the full amount of the tax due.

(2) Every taxpayer or owner or operator of a major facility or vessel which transfers a hazardous substance, as defined in this act, and who is subject to the tax under subsection a. shall within 20 days after the first such transfer in any fiscal year register with the director on such form as shall be prescribed by him.

d. If a return required by this act is not filed, or if a return when filed is incorrect or insufficient in the opinion of the director, the amount of tax due shall be determined by the director from such information as may be available. Notice of such determination shall be given to the taxpayer liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 30 days after receiving notice of such determination, shall apply to the director for a hearing, or unless the director on his own motion shall redetermine the same. After such hearing the director shall give notice of his determination to the person to whom the tax is assessed.

e. Any taxpayer who shall fail to file his return when due or to pay any tax when the same becomes due, as herein provided, shall be subject to such penalties and interest as provided in the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes. If the Division of Taxation determines that the failure to comply with any provision of this section was excusable under the circumstances, it may remit such part or all of the penalty as shall be appropriate under such circumstances.

f. (1) Any person failing to file a return, failing to pay the tax, or filing or causing to be filed, or making or causing to be made, or giving or causing to be given any return, certificate, affidavit, representation, information, testimony or statement required or authorized by this act, or rules or regulations adopted hereunder which is willfully false, or failing to keep any records required by this act or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or elsewhere prescribed, be guilty of a misdemeanor.

(2) The certificate of the director to the effect that a tax has not been paid, that a return has not been filed, that information has not been supplied or that inaccurate information has been supplied pursuant to the provisions of this act or rules or regulations adopted hereunder shall be presumptive evidence thereof.

g. In addition to the other powers granted to the director in this section, he is hereby authorized and empowered:

(1) To delegate to any officer or employee of his division such of his powers and duties as he may deem necessary to carry out efficiently the provisions of this section, and the person or persons to whom such power has been delegated shall possess and may exercise all of said powers and perform all of the duties delegated by the director;

(2) To prescribe and distribute all necessary forms for the implementation of this section.

h. The tax imposed by this act shall be governed in all respects by the provisions of the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes, except only to the extent that a specific provision of this act may be in conflict therewith.

i. Notwithstanding any other provisions of this section, the Treasurer may order the director to levy the tax on all hazardous substances other than petroleum or petroleum products at a specified rate greater than $0.01 per barrel or 0.4% of the fair market value of the product, as the case may be, but in no event to exceed $0.04 per barrel with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, or the greater of $0.04 per barrel or 0.6% of the fair market value of the product with respect to transfers of any other hazardous substances other than petroleum or petroleum products, if and as long as the administrator determines the following:

(1) That pending, reasonable claims against the fund for hazardous substances other than petroleum or petroleum products exceed 70% of the existing balance of the fund, and

(2) That the sum of the claims paid by the fund on behalf of discharges or removals of hazardous substances other than petroleum or petroleum products plus pending, reasonable claims against the fund on behalf of discharges or hazardous substances other than petroleum is equal to or greater than 70% of all claims paid by the fund plus all pending, reasonable claims against the fund.

The provisions of this subsection shall not preclude the imposition of the tax at the higher rate authorized under subsection b. of this section.

L.1976, c. 141, § 9. Amended by L.1979, c. 6, § 1, eff. Jan. 18, 1979; L.1979, c. 346, § 6; L.1980, c. 73, § 3, eff. July 21, 1980.

58.10–23.11*o* Disbursement of moneys from fund; purposes

Moneys in the New Jersey Spill Compensation Fund shall be disbursed by the administrator for the following purposes and no others:

(1) Costs incurred under section 7 of this act;[1]

(2) Damages as defined in section 8 of this act;[2]

(3) Such sums as may be necessary for research on the prevention and the effects of spills of hazardous substances on the marine environment and on the development of improved cleanup and removal operations as may be appropriated by the Legislature; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund;

(4) Such sums as may be necessary for the boards, general administration of the fund, equipment and personnel costs of the department and any other State agency related to the enforcement of this act as may be appropriated by the Legislature;

(5) Such sums as may be appropriated by the Legislature for research and demonstration programs concerning the causes and abatement of ocean pollution; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund.

The Treasurer may invest and reinvest any moneys in said fund in legal obligations of the United States, this State or any of its political subdivisions. Any income or interest derived from such investment shall be included in the fund.

L.1976, c. 141, § 16.

[1]Section 58:10-23.11f.

[2]Section 58:10-23.11g.

58:10–23.11v Inapplicability of act to pursuit of other remedy; double compensation for same damages or costs; prohibition

Nothing in this act shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person. The remedies provided in this act are in addition to those provided by existing statutory or common law, but no person who receives compensation for damages or cleanup costs pursuant to any other State or Federal law shall be permitted to receive compensation for the same damages or cleanup costs under this act.

L.1976, c. 141, § 23.

58:10–23.11z Recommendations for amendments to this act to conform with federal legislation

If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendations to the Legislature for amendments to this act.

L.1976, c. 141, § 27.

§ 9601. Definitions

For purpose of this subchapter, the term—

(1) "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) "Administrator" means the Administrator of the United States Environmental Protection Agency;

(3) "barrel" means forty-two United States gallons at sixty degrees Fahrenheit:

(4) "claim" means a demand in writing for a sum certain;

(5) "claimant" means any person who presents a claim for compensation under this chapter;

(6) "damages" means damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title;

(7) "drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act [42 U.S.C.A. 300f et seq.]) or as drinking water by one or more individuals;

(8) "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States;

(9) "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer

or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel;

(10) "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 1342 of Title 33 and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 1344 of Title 33, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C.A 6925(a) to (d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of Title 33 of [1] section 1413 of Title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C.A.§ 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I part C [42 U.S.C.A. § 7470 et seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administra-

tor of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 1317(b) or (c) of Title 33 and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 1342 of Title 33, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954;

(11) "Fund" or "Trust Fund" means the Hazardous Substance Response Fund established by section 9631 of this title or, in the case of a hazardous waste disposal facility for which liability has been transferred under section 9607(k) of this title, the Post-closure Liability Fund established by section 9641 of this title;

(12) "ground water" means water in a saturated zone or stratum beneath the surface of land or water;

(13) "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this chapter;

(14) "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursu-

ant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317 (a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas);

(15) "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas;

(16) "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, or any foreign government.

(17) "offshore facility" means any facility of any kind located in, on or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(18) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under any land or nonnavigable waters within the United States;

(19) "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party;

(20)(A) "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility;

(B) in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control;

(C) in the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control;

(21) "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body;

(22) "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, but excludes (A) any release which results in exposure to persons soley within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer;

(23) "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary[2] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.];

(24) "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addi-

tion to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials;

(25) "respond" or "response" means remove, removal, remedy, and remedial action;

(26) "transport" or "transportation" means the movement of a hazardous substance by any mode, including pipeline (as defined in the Pipeline Safety Act), and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance;

(27) "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction;

(28) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water;

(29) "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903];

(30) "territorial sea" and "contiguous zone" shall have the meaning provided in section 1362 of Title 33.[3]

(31) "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title; and

(32) "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

§ 9602. Designation of additional hazardous substances and establishment of reportable released quantities; regulations

(a) The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 9601(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9603 of this title. The Administrator may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the medium into which the hazardous substance is released.

(b) Unless and until superseded by regulations establishing a reportable quantity under subsection (a) of this section for any hazardous substance as defined in section 9601(14) of this title (1) a quantity of one pound, or (2) for those hazardous substances for which reportable quantities have been established pursuant to section 1321(b)(4) of Title 33, such reportable quantity, shall be deemed that quantity, the release of which requires notification pursuant to section 9603(a) or (b) of this title.

§ 9603. Notification requirements respecting released substances

(a) Notice to National Response Center upon release from vessel or offshore or onshore facility by person in charge; conveyance of notice by Center

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.]

of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Any person—

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(c) Notice to Administrator of EPA of existence of storage, etc., facility by owner or operator; exceptions; time, manner, and form of notice; penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances (as defined in section 9601(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator shall notify the affected State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title: *Provided, however,* That notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this sub-

section or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(d) Recordkeeping requirements; promulgation of rules and regulations by Administrator of EPA; penalties for violations; waiver of retention requirements

(1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to—

(A) the location, title, or condition of a facility, and

(B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility;

the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection.

(2) Beginning with December 11, 1980, for fifty years thereafter or for fifty years after the date of establishment of a record (whichever is later), or at any such earlier time as a waiver if obtained under paragraph (3) of this subsection, it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates this paragraph shall, upon conviction, be fined not more than $20,000, or imprisoned for not more than one year, or both.

(3) At any time prior to the date which occurs fifty years after December 11, 1980, any person identified under paragraph (1) of this subsection may apply to the Administrator of the Environmental Protection Agency for a waiver of the provisions

of the first sentence of paragraph (2) of this subsection. The Administrator is authorized to grant such waiver if, in his discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this chapter. The Administrator shall promulgate rules and regulations regarding such a waiver so as to inform parties of the proper application procedure and conditions for approval of such a waiver.

(4) Notwithstanding the provisions of this subsection, the Administrator of the Environmental Protection Agency may in his discretion require any such person to retain any record identified pursuant to paragraph (1) of this subsection for such a time period in excess of the period specified in paragraph (2) of this subsection as the Administrator determines to be necessary to protect the public health or welfare.

(e) Applicability to registered pesticide product

This section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S. C.A. § 136 et seq.] or to the handling and storage of such a pesticide product by an agricultural producer.

(f) Exemptions from notice and penalty provisions for substances reported under other Federal law or is in continuous release, etc.

No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance—

(1) which is required to be reported (or specifically exempted from a requirement for reporting) under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] or regulations thereunder and which has been reported to the National Response Center, or

(2) which is a continuous release, stable in quantity and rate, and is—

(A) from a facility for which notification has been given under subsection (c) of this section, or

(B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release:

Provided, That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

§ 9604. Response authorities

(a) Removal and other remedial action by President; applicability of national contingency plan; definition

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

(2) For the purposes of this section, "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring. The term does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as hazardous substances under section 9601(14)(A) through (F) of this title, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(b) Investigations, monitoring, etc., by President

Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

(c) Criteria for continuance of obligations from Fund over specified amount for response actions; consultation by President with affected States; contracts or cooperative agreements by States with President prior to remedial actions; cost-sharing agreements; selection by President of appropriate remedial actions

(1) Unless (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, obligations from the Fund, other than those authorized by subsection (b) of this section, shall not continue after $1,000,000 has been obligated for response actions or six months has elapsed from the date of initial response to a release or threatened release of hazardous substances.

(2) The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section.

(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; (B) the State will assure the availability of a hazardous waste disposal facility acceptable to the President and in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for any necessary offsite storage,

destruction, treatment, or secure disposition of the hazardous substances; and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance, or (ii) at least 50 per centum or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision, of any sums expended in response to a release at a facility that was owned at the time of any disposal of hazardous substances therein by the State or a political subdivision thereof. The President shall grant the State a credit against the share of the costs for which it is responsible under this paragraph for any documented direct out-of-pocket non-Federal funds expended or obligated by the State or a political subdivision thereof after January 1, 1978, and before December 11, 1980, for cost-eligible response actions and claims for damages compensable under section 9611 of this title relating to the specific release in question: *Provided, however,* That in no event shall the amount of the credit granted exceed the total response costs relating to the release.

(4) The President shall select appropriate remedial actions determined to be necessary to carry out this section which are to the extent practicable in accordance with the national contingency plan and which provide for that cost-effective response which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund established under subchapter II of this chapter to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the need for immediate action.

(d) Contracts or cooperative agreements by President with States or political subdivisions; cost-sharing provisions; enforcement requirements and procedures

(1) Where the President determines that a State or political subdivision thereof has the capability to carry out any or all of the actions authorized in this section, the President may, in

his discretion, enter into a contract or cooperative agreement with such State or political subdivision to take such actions in accordance with criteria and priorities established pursuant to section 9605(8) of this title and to be reimbursed for the reasonable response costs thereof from the Fund. Any contract made hereunder shall be subject to the cost-sharing provisions of subsection (c) of this section.

(2) If the President enters into a cost-sharing agreement pursuant to subsection (c) of this section or a contract or cooperative agreement pursuant to this subsection, and the State or political subdivision thereof fails to comply with any requirements of the contract, the President may, after providing sixty days notice, seek in the appropriate Federal district court to enforce the contract or to recover any funds advanced or any costs incurred because of the breach of the contract by the State or political subdivision.

(3) Where a State or a political subdivision thereof is acting in behalf of the President, the President is authorized to provide technical and legal assistance in the administration and enforcement of any contract or subcontract in connection with response actions assisted under this subchapter, and to intervene in any civil action involving the enforcement of such contract or subcontract.

(4) Where two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one for purposes of this section.

(e) Access to, and copying of, records relating to covered substances; availability to public of records, reports, and information; procedures applicable

(1) For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats, or

disposes of, or, where necessary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the President, duly designated by the President, or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized—

(A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;

(B) to inspect and obtain samples from any person of any such substance and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or person in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume of weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or person in charge.

(2)(A) Any records, reports, or information obtained from any person under this section (including records, reports, or information obtained by representatives of the President) shall be available to the public, except that upon a showing satisfactory to the President (or the State, as the case may be) by any person that records, reports, or information, or particular part thereof (other than health or safety effects data), to which the President (or the State, as the case may be) or any officer,

employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of Title 18, such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter.

(B) Any person not subject to the provisions of section 1905 of Title 18 who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(C) In submitting data under this chapter, a person required to provide such data may (i) designate the data which such person believes is entitled to protection under this subsection and (ii) submit such designated data separately from other data submitted under this chapter. A designation under this paragraph shall be made in writing and in such manner as the President may prescribe by regulation.

(D) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this chapter shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(f) Contracts for response actions; compliance with Federal health and safety standards

In awarding contracts to any person engaged in response actions, the President or the State, in any case where it is awarding contracts pursuant to a contract entered into under subsection (d) of this section, shall require compliance with Federal health and safety standards established under section

9651(f) of this title by contractors and subcontractors as a condition of such contracts.

(g) Rates for wages and labor standards applicable to covered work

(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act [40 U.S.C.A. § 276a et seq.]. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.

(2) The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

(h) Emergency procurement powers; exercise by President

Notwithstanding any other provision of law, subject to the provisions of section 9611 of this title, the President may authorize the use of such emergency procurement powers as he deems necessary to effect the purpose of this chapter. Upon determination that such procedures are necessary, the President shall promulgate regulations prescribing the circumstances under which such authority shall be used and the procedures governing the use of such authority.

(i) Agency for Toxic Substances and Disease Registry; establishment, functions, etc.

There is hereby established within the Public Health Service an agency, to be known as the Agency for Toxic Substances and Disease Registry, which shall report directly to the Surgeon

General of the United States. The Administrator of said Agency shall, with the cooperation of the Administrator of the Environmental Protection Agency, the Commissioner of the Food and Drug Administration, the Directors of the National Institute of Medicine, National Institute of Environmental Health Sciences, National Institute of Occupational Safety and Health, Centers for Disease Control, the Administrator of the Occupational Safety and Health Administration, and the Administrator of the Social Security Administration, effectuate and implement the health related authorities of this chapter. In addition, said Administrator shall—

(1) in cooperation with the States, establish and maintain a national registry of serious diseases and illnesses and a national registry of persons exposed to toxic substances;

(2) establish and maintain inventory of literature, research, and studies on the health effects of toxic substances;

(3) in cooperation with the States, and other agencies of the Federal Govemment, establish and maintain a complete listing of areas closed to the public or otherwise restricted in use because of toxic substance contamination;

(4) in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, provide medical care and testing to exposed individuals, including but not limited to tissue sampling, chromosomal testing, epidemiological studies, or any other assistance appropriate under the circumstances; and

(5) either independently or as part of other health status survey, conduct periodic survey and screening programs to determine relationships between exposure to toxic substances and illness. In cases of public health emergencies, exposed persons shall be eligible for admission to hospitals and other facilities and services operated or provided by the Public Health Service.

§ 9605. National contingency plan; preparation, contents, etc.

Within one hundred and eighty days after December 11, 1980, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 1321 of Title 33, to reflect and effectuate the responsibilities and powers created by his chapter, in addition to those matters specified in section 1321(c)(2) of Title 33. Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:

(1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;

(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this chapter;

(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;

(5) provision for identification, procurement, maintenance, and storage of response equipment and supplies;

(6) a method for and assignment of responsibility for reporting the existence of such facilities which may be located on federally owned or controlled properties and any releases of hazardous substances from such facilities;

(7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials;

(8)(A) criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, State preparedness to assume State costs and responsibilities, and other appropriate factors;

(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. Within one year after December 11, 1980, and annually thereafter, each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in subparagraph (A) of this paragraph. In assembling or revising the national list, the President shall consider any priorities established by the States. To the extent practicable, at least four hundred of the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities at least one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to pub-

lic health or welfare or the environment among the known facilities in such State. Other priority facilities or incidents may be listed singly or grouped for response priority purposes; and

(9) specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, including identification of appropriate qualifications and capacity therefor.

The plan shall specify procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances comparable to those required under section 1321(c)(2) (F) and (G) and (j)(1) of Title 33. Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan. The President may, from time to time, revise and republish the national contingency plan.

§ 9606. Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines

Any person who willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5,000 for each day in which such violation occurs or such failure to comply continues.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of Title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j–4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of Title 15.

§ 9607. Liability

(a) Covered persons; scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a

hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of

1979 [49 U.S.C.A. § 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14) (A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33 or 46, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the

amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Activities pursuant to national contingency plan

No person shall be liable under this subchapter for damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the national contingency plan or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or the threat thereof. This subsection shall not preclude liability for damages as the result of gross negligence or intentional misconduct on the part of such person. For the purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability

under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Actions involving natural resources; maintenance, scope, etc.

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State: *Provided, however*, That no liability to the United States or State shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(g) Applicability to Federal Government branches

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Govern-

ment shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff).

(i) Application of registered pesticide product

No person (including the United States or any State) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In

addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A.§ 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A.§ 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C.A. § 6926(b)]) that the conditions imposed by this subsection have been satisfied. If

within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an

examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

§ 9608. Financial responsibility

(a) Establishment and maintenance by owner or operator of vessel; amount; failure to obtain certification of compliance

(1) The owner or operator of each vessel (except a nonself-propelled barge that does not carry hazardous substances as cargo) over three hundred gross tons that uses any port or place in the United States or the navigable waters or any offshore facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility of $300 per gross ton (or for a vessel carrying hazardous substances as cargo, or $5,000,000, whichever is greater). Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, or qualification as a self-insurer. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In cases where an owner or operator owns, operates, or charters more than one vessel subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the largest of such vessels.

(2) The Secretary of the Treasury shall withhold or revoke the clearance required by section 91 of Title 46 of any vessel subject to this subsection that does not have certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(3) The Secretary of Transportation, in accordance with regulations issued by him, shall (A) deny entry to any port or place in the United States or navigable waters to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection that, upon request, does not produce certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(b) Establishment and maintenance by owner or operator of production, etc., facilities; amount; adjustment; consolidated form of responsibility; coverage of motor carriers

(1) Beginning not earlier than five years after December 11, 1980, the President shall promulgate requirements (for facilities in addition to those under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] and other Federal law) that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.

(2) The level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction. To the maximum extent practicable, the President shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements.

(3) Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements over a period of not less than three and no more than six years after the date of promulgation. Where possible, the level of financial responsibility which the President believes appropriate as a final requirement shall be achieved through incremental, annual increases in the requirements.

(4) Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. When evidence of financial responsibility is established in a consolidated form, the proportional share of each participant shall be shown. The evidence shall be accompanied by a statement authorizing the applicant to act for and in behalf of each participant in submitting and maintaining the evidence of financial responsibility.

(5) The requirements for evidence of financial responsibility for motor carriers covered by this chapter shall be determined under section 30 of the Motor Carrier Act of 1980, Public Law 96-296.

(c) Claims against guarantor; maintenance, etc.

Any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility as required under this section. In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this subchapter. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but such guarantor may not invoke any other defense that such guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

(d) Liability of guarantor

Any guarantor acting in good faith against which claims under this chapter are asserted as a guarantor shall be liable under section 9607 of this title or section 9612(c) of this title only up to the monetary limits of the policy of insurance or indemnity contract such guarantor has undertaken or of the guaranty of other evidence of financial responsibility furnished under this section, and only to the extent that liability is not excluded by restrictive endorsement: *Provided,* That this subsection shall not alter the liability of any person under section 9607 of this title.

§ 9609. Civil penalties

Any person who, after notice and an opportunity for a hearing, is found to have failed to comply with the requirements of section 9608 of this title, the regulations issued thereunder, or with any denial or detention order shall be liable to the United States for a civil penalty, not to exceed $10,000 for each day of violation.

§ 9610. Employee protection

(a) Activities of employee subject to protection

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

(b) Administrative grievance procedure in cases of alleged violations

Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person, who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of Title 5. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former

position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions are subject to judicial review under this chapter.

(c) Assessment of costs and expenses against violator subsequent to issuance of order of abatement

Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

(d) Defenses

This section shall have no application to any employee who acting without discretion from his employer (or his agent) deliberately violates any requirement of this chapter.

(e) Presidential evaluations of potential loss of shifts of employment resulting from administration or enforcement of provisions; investigations; procedures applicable, etc.

The President shall conduct continuing evaluations of potential loss of shifts of employment which may result from the administration or enforcement of the provisions of this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement. Any employee who is discharged, or laid off, threatened with discharge or layoff, or otherwise discriminated against by any person because of the alleged results of such administration or enforcement, or any representative of such employee, may request the President to conduct a full investigation of the matter and, at the request of

any party, shall hold public hearings, require the parties, including the employer involved, to present information relating to the actual or potential effect of such administration or enforcement on employment and any alleged discharge, layoff, or other discrimination, and the detailed reasons or justification therefore. Any such hearing shall be of record and shall be subject to section 554 of Title 5. Upon receiving the report of such investigation, the President shall make findings of fact as to the effect of such administration or enforcement on employment and on the alleged discharge, layoff, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the President or any State to modify or withdraw any action, standard, limitation, or any other requirement of this chapter.

§ 9611. Uses of Fund

(a) Authorized purposes

The President shall use the money in the Fund for the following purposes:

(1) payment of governmental response costs incurred pursuant to section 9604 of this title, including costs incurred pursuant to the Intervention on the High Seas Act [33 U.S.C.A. § 1471 et seq.];

(2) payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of Title 33 and amended by section 9605 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official;

(3) payment of any claim authorized by subsection (b) of this section and finally decided pursuant to section 9612 of this title, including those costs set out in subsection 9612(c)(3) of this title; and

(4) payment of costs specified under subsection (c) of this section.

The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this subchapter.

(b) Additional authorized purposes

Claims asserted and compensable but unsatisfied under provisions of section 1321 of Title 33, which are modified by section 304 of this Act may be asserted against the Fund under this subchapter; and other claims resulting from a release or threat of release of a hazardous substance from a vessel or a facility may be asserted against the Fund under this subchapter for injury to, or destruction or loss of, natural resources, including cost for damage assessment: *Provided, however,* That any such claim may be asserted only by the President, as trustee, for natural resources over which the United States has sovereign rights, or natural resources within the territory or the fishery conservation zone of the United States to the extent they are managed or protected by the United States, or by any State for natural resources within the boundary of that State belonging to, managed by, controlled by, or appertaining to the State.

(c) Peripheral matters and limitations

Uses of the Fund under subsection (a) of this section include—

(1) the costs of assessing both short-term and long-term injury to, destruction of, or loss of any natural resources resulting from a release of a hazardous substance;

(2) the costs of Federal or State efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance;

(3) subject to such amounts as are provided in appropriation Acts, the costs of a program to identify, investigate,

and take enforcement and abatement action against releases of hazardous substances;

(4) the costs of epidemiologic studies, development and maintenance of a registry of persons exposed to hazardous substances to allow long-term health effect studies, and diagnostic services not otherwise available to determine whether persons in populations exposed to hazardous substances in connection with a release or a suspected release are suffering from long-latency diseases;

(5) subject to such amounts as are provided in appropriation Acts, the costs of providing equipment and similar overhead, related to the purposes of this chapter and section 1321 of Title 33, and needed to supplement equipment and services available through contractors or other non-Federal entities, and of establishing and maintaining damage assessment capability, for any Federal agency involved in strike forces, emergency task forces, or other response teams under the national contingency plan; and

(6) subject to such amounts as are provided in appropriation Acts, the costs of a program to protect the health and safety of employees involved in response to hazardous substance releases. Such program shall be developed jointly by the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health and shall include, but not be limited to, measures for identifying and assessing hazards to which persons engaged in removal, remedy, or other response to hazardous substances may be exposed, methods to protect workers from such hazards, and necessary regulatory and enforcement measures to assure adequate protection of such employees.

(d) Additional limitations

(1) No money in the Fund may be used under subsection (c)(1) and (2) of this section, nor for the payment of any claim under subsection (b) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous

substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) No money in the Fund may be used for the payment of any claim under subsection (b) of this section where such expenses are associated with injury or loss resulting from long-term exposure to ambient concentrations of air pollutants from multiple or diffuse sources.

(e) Funding requirements respecting moneys in Fund

(1) Claims against or presented to the Fund shall not be valid or paid in excess of the total money in the Fund at any one time. Such claims become valid only when additional money is collected, appropriated, or otherwise added to the Fund. Should the total claims outstanding at any time exceed the current balance of the Fund, the President shall pay such claims, to the extent authorized under this section, in full in the order in which they were finally determined.

(2) In any fiscal year, 85 percent of the money credited to the Fund under subchapter II of this chapter shall be available only for the purposes specified in paragraphs (1), (2), and (4) of subsection (a) of this section.

(3) No money in the Fund shall be available for remedial action, other than actions specified in subsection (c) of this section, with respect to federally owned facilities.

(4) Paragraphs (1) and (4) of subsection (a) of this section shall in the aggregate be subject to such amounts as are provided in appropriation Acts.

(f) Obligation of moneys by Federal officials; obligation of moneys or settlement of claims by State officials

The President is authorized to promulgate regulations designating one or more Federal officials who may obligate money in the Fund in accordance with this section or portions thereof. The President is also authorized to delegate authority to obligate money in the Fund or to settle claims to officials of a State operating under a contract or cooperative agreement with

the Federal Government pursuant to section 9604(d) of this title.

(g) Notice to potential injured parties by owner and operator of vessel or facility causing release of substance; rules and regulations

The President shall provide for the promulgation of rules and regulations with respect to the notice to be provided to potential injured parties by an owner and operator of any vessel, or facility from which a hazardous substance has been released. Such rules and regulations shall consider the scope and form of the notice which would be appropriate to carry out the purposes of this subchapter. Upon promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide notice in accordance with such rules and regulations. With respect to releases from public vessels, the President shall provide such notification as is appropriate to potential injured parties. Until the promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area.

(h) Assessment of damages for injury, etc., to natural resources from release of substances; determination, etc.

(1) In accordance with regulations promulgated under section 9651(c) of this title, damages for injury to, destruction of, or loss of natural resources resulting from a release of a hazardous substance, for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33, shall be assessed by Federal officials designated by the President under the national contingency plan published under section 9605 of this title, and such officials shall act for the President as trustee under this section and section 1321(f)(5) of Title 33.

(2) Any determination or assessment of damages for injury to, destruction of, or loss of natural resources for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33 shall have the force and effect of a rebuttable presumption on behalf of any claimant (including a trustee under section 9607 of this title or a Federal agency) in any judicial or adjudicatory administrative proceeding under this chapter or section 1321 of Title 33.

(i) Restoration, etc., of natural resources

Except in a situation requiring action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action, funds may not be used under this chapter for the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources until a plan for the use of such funds for such purposes has been developed and adopted by affected Federal agencies and the Governor or Governors of any State having sustained damage to natural resources within its borders, belonging to, managed by or appertaining to such State, after adequate public notice and opportunity for hearing and consideration of all public comment.

(j) Use of Post-closure Liability Fund

The President shall use the money in the Post-closure Liability Fund for any of the purposes specified in subsection (a) of this section with respect to a hazardous waste disposal facility for which liability has transferred to such fund under section 9607(k) of this title, and, in addition, for payment of any claim or appropriate request for costs of response, damages, or other compensation for injury or loss under section 9607 of this title or any other State or Federal law, resulting from a release of a hazardous substance from such a facility.

(k) Audit review, etc., by Inspector General of Federal department or agency delegated with responsibility to obligate moneys

The Inspector General of each department or agency to which responsibility to obligate money in the Fund is delegated

shall provide an audit review team to audit all payments, obligations, reimbursements, or other uses of the Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. Each such Inspector General shall submit to the Congress an interim report one year after the establishment of the Fund and a final report two years after the establishment of the Fund. Each such Inspector General shall thereafter provide such auditing of the Fund as is appropriate. Each Federal agency shall cooperate with the Inspector General in carrying out this subsection.

(l) Foreign claimants

To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if—

(1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;

(2) the claimant is not otherwise compensated for his loss;

(3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331 et seq.) or the Deepwater Port Act of 1974, as amended (33 U.S.C. 1501 et seq.); and

(4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.

§ 9612. Claims procedure

(a) Presentment of assertable claims against owner, operator, guarantor, or other person; election of available remedies upon failure to satisfy presentment

All claims which may be asserted against the Fund pursuant to section 9611 of this title shall be presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 9607 of this title. In any case where the claim has not been satisfied within sixty days of presentation in accordance with this subsection, the claimant may elect to commence an action in court against such owner, operator, guarantor, or other person or to present the claim to the Fund for payment.

(b) Forms and procedures applicable

(1) The President shall prescribe appropriate forms and procedures for claims filed hereunder, which shall include a provision requiring the claimant to make a sworn verification of the claim to the best of his knowledge. Any person who knowingly gives or causes to be given any false information as a part of any such claim shall, upon conviction, be fined up to $5,000 or imprisoned for not more than one year, or both.

(2)(A) Upon receipt of any claim, the President shall as soon as practicable inform any known affected parties of the claim and shall attempt to promote and arrange a settlement between the claimant and any person who may be liable. If the claimant and alleged liable party or parties can agree upon a settlement, it shall be final and binding upon the parties thereto, who will be deemed to have waived all recourse against the Fund.

(B) Where a liable party is unknown or cannot be determined, the claimant and the President shall attempt to arrange settlement of any claim against the Fund. The President is authorized to award and make payment of such a settlement,

subject to such proof and procedures as he may promulgate by regulation.

(C) Except as provided in subparagraph (D) of this paragraph, the President shall use the facilities and services of private insurance and claims adjusting organizations or State agencies in implementing this subsection and may contract to pay compensation for those facilities and services. Any contract made under the provisions of this paragraph may be made without regard to the provisions of section 5 of Title 41, upon a showing by the President that advertising is not reasonably practicable. When the services of a State agency are used hereunder, no payment may be made on a claim asserted on behalf of that State or any of its agencies or subdivisions unless the payment has been approved by the President.

(D) To the extent necessitated by extraordinary circumstances, where the services of such private organizations or State agencies are inadequate, the President may use Federal personnel to implement this subsection.

(3) If no settlement is reached within forty-five days of filing of a claim through negotiation pursuant to this section, the President may, if he is satisfied that the information developed during the processing of the claim warrants it, make and pay an award of the claim. If the claimant is dissatisfied with the award, he may appeal it in the manner provided for in subparagraph (G) of paragraph (4) of this subsection. If the President declines to make an award, he shall submit the claim for decision to a member of the Board of Arbitrators established pursuant to paragraph (4).

(4)(A) Within ninety days of December 11, 1980, the President shall establish a Board of Arbitrators to implement this subsection. The Board shall consist of as many members as the President may determine will be necessary to implement this subsection expeditiously, and he may increase or decrease the size of the Board at any time in his discretion in order to enable it to respond to the demands of such implementation. Each

member of the Board shall be selected through utilization of the procedures of the American Arbitration Association: *Provided, however*, That no regular employee of the President or any of the Federal departments, administrations, or agencies to whom he delegated responsibilities under this chapter shall act as a member of the Board.

(B) Hearings conducted hereunder shall be public and shall be held in such place as may be agreed upon by the parties thereto, or, in the absence of such agreement, in such place as the President determines, in his discretion, will be most convenient for the parties thereto.

(C) Hearings before a member of the Board shall be informal, and the rules of evidence prevailing in judicial proceedings need not be required. Each member of the Board shall have the power to administer oaths and to subpena the attendance and testimony of witnesses and the production of books, records, and other evidence relative or pertinent to the issues presented to him for decision. Testimony may be taken by interrogatory or deposition. Each person appearing before a member of the Board shall have the right to counsel. Subpenas shall be issued and enforced in accordance with procedures in subsection (d) of section 555 of Title 5, and rules promulgated by the President. If a person fails or refuses to obey a subpena, the President may invoke the aid of the district court of the United States where the person is found , resides, or transacts business in requiring the attendance and testimony of the person and the production by him of books, papers, documents, or any tangible things.

(D) In any proceeding before a member of the Board, the claimant shall bear the burden of proving his claim. Should a member of the Board determine that further investigations, monitoring, surveys, testing, or other information gathering would be useful and necessary in deciding the claim, he may request the President in writing to undertake such activities pursuant to section 9604(b) of this title. The President shall dispose of such a request in his sole discretion, taking into account

various competing demands and the availability of the technical and financial capacity to conduct such studies, monitoring, and investigations. Should the President decide to undertake the requested actions, all time requirements for the processing and deciding of claims hereunder shall be suspended until the President reports the results thereof to the member of the Board.

(E) All costs and expenses approved by the President attributable to the employment of any member of the Board shall be payable from the Fund, including fees and mileage expenses for witnesses summoned by such members on the same basis and to the same extent as if such witnesses were summoned before a district court of the United States.

(F) All decisions rendered by members of the Board shall be in writing, with notification to all appropriate parties, and shall be rendered within ninety days of submission of a claim to a member, unless all the parties to the claim agree in writing to an extension or unless the President extends the time limit pursuant to subparagraph (I) of this subsection.

(G) All decisions rendered by members of the Board shall be final, and any party to the proceeding may appeal such a decision within thirty days of notification of the award or decision. Any such appeal shall be made to the Federal district court for the district where the arbitral hearing took place. In any such appeal, the award or decision of the member of the Board shall be considered binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of the member's discretion: *Provided, however*, That no such award or decision shall be admissible as evidence of any issue of fact or law in any proceeding brought under any other provision of this chapter or under any other provision of law. Nor shall any prearbitral settlement reached pursuant to subsection (b)(2)(A) of this section be admissible as evidence in any such proceeding.

(H) Within twenty days of the expiration of the appeal period for any arbitral award or decision, or within twenty days of the final judicial determination of any appeal taken pursuant

to this subsection, the President shall pay any such award from the Fund. The President shall determine the method, terms, and time of payment.

(I) If at any time the President determines that, because of a large number of claims arising from any incident or set of incidents, it is in the best interests of the parties concerned, he may extend the time for prearbitral negotiation or for rendering an arbitral decision pursuant to this subsection by a period not to exceed sixty days. He may also group such claims for submission to a member of the Board of Arbitrators.

(c) Subrogation rights; actions maintainable

(1) Payment of any claim by the Fund under this section shall be subject to the United States Government acquiring by subrogation the rights of the claimant to recover those costs of removal or damages for which it has compensated the claimant from the person responsible or liable for such release.

(2) Any person, including the Fund, who pays compensation pursuant to this chapter to any claimant for damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights, claims, and causes of action for such damages and costs of removal that the claimant has under this chapter or any other law.

(3) Upon request of the President, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this subchapter, and, without regard to any limitation of liability, all interest, administrative and adjudicative costs, and attorney's fees incurred by the Fund by reason of the claim. Such an action may be commenced against any owner, operator, or guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the damages or costs for which compensation was paid.

(d) Time for presentation of claims or maintenance of actions

No claim may be presented, nor may an action be commenced for damages under this subchapter, unless that claim is presented or action commenced within three years from the date of the discovery of the loss or December 11, 1980, whichever is later: *Provided, however*, That the time limitations contained herein shall not begin to run against a minor until he reaches eighteen years of age or a legal representative is duly appointed for him, nor against an incompetent person until his incompetency ends or a legal representative is duly appointed for him.

(e) Other statutory or common law claims not waived, etc.

Regardless of any State statutory or common law to the contrary, no person who asserts a claim against the Fund pursuant to this subchapter shall be deemed or held to have waived any other claim not covered or assertable against the Fund under this subchapter arising from the same incident, transaction, or set of circumstances, nor to have split a cause of action. Further, no person asserting a claim against the Fund pursuant to this subchapter shall as a result of any determination of a question of fact or law made in connection with that claim be deemed or held to be collaterally estopped from raising such question in connection with any other claim not covered or assertable against the Fund under this subchapter arising from the same incident, transaction, or set of circumstances.

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been

obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsection (a) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

§ 9614. Relationship to other law

(a) Additional State liability or requirements with respect to release of substances within State

Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

(b) Recovery under other State or Federal law of compensation for removal costs or damages, or payment of claims

Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

(c) Contributions to other funds; limitations, etc.

Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

(d) Financial responsibility of owner or operator of vessel or facility under State or local law, rule, or regulation

Except as provided in this subchapter, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility. Evidence of compliance with the financial responsibility requirements of this subchapter shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such vessel or facility.

§ 9615. Presidential delegation and assignment of duties or powers and promulgation of regulations

The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter.

SUBCHAPTER II—HAZARDOUS SUBSTANCE RESPONSE REVENUE

PART A—HAZARDOUS SUBSTANCE RESPONSE TRUST FUND

§ 9631. Establishment of Hazardous Substance Response Trust Fund

(a) Creation of Trust Fund

There is established in the Treasury of the United States a trust fund to be known as the "Hazardous Substance Response Trust Fund" (hereinafter in this part referred to as the "Response Trust Fund"), consisting of such amounts as may be appropriated or transferred to such Trust Fund as provided in this section.

(b) Transfers to Response Trust Fund

(1) Amounts equivalent to certain taxes, etc.

There are hereby appropriated, out of any money in the Treasury not otherwise appropriated, to the Response Trust Fund amounts determined by the Secretary of the Treasury (hereinafter in this subtitle referred to as the "Secretary") to be equivalent to—

(A) the amounts received in the Treasury under section 4611 or 4661 of Title 26,

(B) the amounts recovered on behalf of the Response Trust Fund under this chapter,

(C) all moneys recovered or collected under section 1321(b)(6)(B) of Title 33,

(D) penalties assessed under subchapter I of this chapter, and

(E) punitive damages under section 9607(c)(8) of this title.

(2) Authorization for appropriations

There is authorized to be appropriated to the Emergency Response Trust Fund for fiscal year—

(A) 1981, $44,000,000,

(B) 1982, $44,000,000,

(C) 1983, $44,000,000,

(D) 1984, $44,000,000, and

(E) 1985, $44,000,000, plus an amount equal to so much of the aggregate amount authorized to be appropriated under subparagraphs (A), (B), (C), and (D) as has not been appropriated before October 1, 1984.

(3) Transfer of funds

There shall be transferred to the Response Trust Fund—

(A) one-half of the unobligated balance remaining before December 11, 1980, under the Fund in section 1321 of Title 33, and

(B) the amounts appropriated under section 1364(b) of Title 33 during any fiscal year.

(c) Expenditures from Response Trust Fund

(1) In general

Amounts in the Response Trust Fund shall be available in connection with releases or threats of releases of hazardous sub-

stances into the environment only for purposes of making expenditures which are described in section 9611 (other than subsection (j) thereof) of this title, as in effect on December 11, 1980, including—

(A) response costs,

(B) claims asserted and compensable but unsatisfied under section 1321 of Title 33,

(C) claims for injury to, or destruction or loss of, natural resources, and

(D) related costs described in section 9611(c) of this title.

(2) Limitations on expenditures

At least 85 percent of the amounts appropriated to the Response Trust Fund under subsection (b)(1)(A) and (2) of this section shall be reserved—

(A) for the purposes specified in paragraphs (1), (2), and (4) of section 9611(a) of this title, and

(B) for the repayment of advances made under section 9633(c) of this title, other than advances subject to the limitation of section 9633(c)(2)(C) of this title.

§ 9632. Liability of United States limited to amount in Trust Fund

(a) General rule

Any claim filed against the Response Trust Fund may be paid only out of such Trust Fund. Nothing in this chapter (or in any amendment made by this Act) shall authorize the payment by the United States Government of any additional amount with respect to any such claim out of any source other than the Response Trust Fund.

(b) Order in which unpaid claims are to be paid

If at any time the Response Trust Fund is unable (by reason of subsection (a) of this section or the limitation of section 9631(c)(2) of this title) to pay all of the claims payable out of such Trust Fund at such time, such claims shall, to the extent permitted under subsection (a) of this section, be paid in full in the order in which they were finally determined.

§ 9633. Administrative provisions

(a) Method of transfer

The amounts appropriated by section 9631(b)(1) of this title shall be transferred at least monthly from the general fund of the Treasury to the Response Trust Fund on the basis of estimates made by the Secretary of the amounts referred to in such section. Proper adjustments shall be made in the amount subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.

(b) Management of Trust Fund

(1) Report

The Secretary shall be the trustee of the Response Trust Fund, and shall report to the Congress for each fiscal year ending on or after September 30, 1981, on the financial condition and the results of the operations of such Trust Fund during such fiscal year and on its expected condition and operations during the next 5 fiscal years. Such report shall be printed as a House document of the session of the Congress to which the report is made.

(2) Investment

It shall be the duty of the Secretary to invest such portion of such Trust Fund as is not, in his judgment, required to meet current withdrawals. Such investments shall be in public debt securities with maturities suitable for the needs of such Trust

Fund and bearing interest at rates determined by the Secretary, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The income on such investments shall be credited to and form a part of such Trust Fund.

(c) Authority to borrow

(1) In general

There are authorized to be appropriated to the Response Trust Fund, as repayable advances, such sums as may be necessary to carry out the purposes of such Trust Fund.

(2) Limitations on advances to Response Trust Fund

(A) Aggregate advances

The maximum aggregate amount of repayable advances to the Response Trust Fund which is outstanding at any one time shall not exceed an amount which the Secretary estimates will be equal to the sum of the amounts which will be appropriated or transferred to such Trust Fund under paragraph (l)(A) of section 9631(b) of this title for the following 12 months, and

(B) Advances for payment of response costs

No amount may be advanced after March 31, 1983, to the Response Trust Fund for the purpose of paying response costs described in section 9611(a)(1), (2), or (4) of this title, unless such costs are incurred incident to any spill the effects of which the Secretary determines to be catastrophic.

(C) Advances for other costs

The maximum aggregate amount advanced to the Response Trust Fund which is outstanding at any one time for the purpose of paying costs other than costs described in section 9611(a)(1), (2), or (4) of this title shall not exceed one-third of the amount of the estimate made under subparagraph (A).

(D) Final repayment

No advance shall be made to the Response Trust Fund after September 30, 1985, and all advances to such Fund shall be repaid on or before such date.

(3) Repayment of advances

Advances made pursuant to this subsection shall be repaid, and interest on such advances shall be paid, to the general fund of the Treasury when the Secretary determines that moneys are available for such purposes in the Trust Fund to which the advance was made. Such interest shall be at rates computed in the same manner as provided in subsection (b) of this section and shall be compounded annually.

PART B—POST-CLOSURE LIABILITY TRUST FUND

§ 9641. Post-closure Liability Trust Fund

(a) Creation of Trust Fund

There is established in the Treasury of the United States a trust fund to be known as the "Post-closure Liability Trust Fund", consisting of such amounts as may be appropriated, credited, or transferred to such Trust Fund.

(b) Expenditures from Post-closure Liability Trust Fund

Amounts in the Post-closure Liability Trust Fund shall be available only for the purposes described in sections 9607(k) and 9611(j) of this title (as in effect on December 11, 1980).

(c) Administrative provisions

The provisions of sections 9632 and 9633 of this title shall apply with respect to the Trust Fund established under this section, except that the amount of any repayable advances outstanding at any one time shall not exceed $200,000,000.

SUBCHAPTER III—MISCELLANEOUS PROVISIONS

§ 9651. Reports and studies

(a) Implementation experiences; identification and disposal of waste

(1) The President shall submit to the Congress, within four years after December 11, 1980, a comprehensive report on experience with the implementation of this chapter including, but not limited to—

(A) the extent to which the chapter and Fund are effective in enabling Government to respond to and mitigate the effects of releases of hazardous substances;

(B) a summary of past receipts and disbursements from the Fund;

(C) a projection of any future funding needs remaining after the expiration of authority to collect taxes, and of the threat to public health, welfare, and the environment posed by the projected releases which create any such needs;

(D) the record and experience of the Fund in recovering Fund disbursements from liable parties;

(E) the record of State participation in the system of response, liability, and compensation established by this chapter;

(F) the impact of the taxes imposed by subchapter II of this chapter on the Nation's balance of trade with other countries;

(G) an assessment of the feasibility and desirability of a schedule of taxes which would take into account one or more of the following: the likelihood of a release of a hazardous substance, the degree of hazard and risk of harm to public health, welfare, and the environment resulting from any such release, incentives to proper handling, recycling, incineration, and neutralization of hazardous wastes, and disincentives to improper or illegal handling or disposal of

hazardous materials, administrative and reporting burdens on Government and industry, and the extent to which the tax burden falls on the substances and parties which create the problems addressed by this chapter. In preparing the report, the President shall consult with appropriate Federal, State, and local agencies, affected industries and claimants, and such other interested parties as he may find useful. Based upon the analyses and consultation required by this subsection, the President shall also include in the report any recommendations for legislative changes he may deem necessary for the better effectuation of the purposes of this chapter, including but not limited to recommendations concerning authorization levels, taxes, State participation, liability and liability limits, and financial responsibility provisions for the Response Trust Fund and the Post-closure Liability Trust Fund;

(H) an exemption from or an increase in the substances or the amount of taxes imposed by section 4661 of Title 26 for copper, lead, and zinc oxide, and for feedstocks when used in the manufacture and production of fertilizers, based upon the expenditure experience of the Response Trust Fund;

(I) the economic impact of taxing coal-derived substances and recycled metals.

(2) The Administrator of the Environmental Protection Agency (in consultation with the Secretary of the Treasury) shall submit to the Congress (i) within four years after December 11, 1980, a report identifying additional wastes designated by rule as hazardous after the effective date of this chapter and pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] and recommendations on appropriate tax rates for such wastes for the Post-closure Liability Trust Fund. The report shall, in addition, recommend a tax rate, considering the quantity and potential danger to human health and the environment posed by the disposal of any wastes which the Administrator, pursuant to subsection 3001(b)(2)(B) and subsection 3001(b)(3)(A) of the Solid Waste Disposal Act of 1980 [42

U.S.C.A. §§ 6921(b)(2)(B) and 6921(b)(3)(A)], has determined should be subject to regulation under subtitle C of such Act [42 U.S.C.A. § 6921 et seq.], (ii) within three years after December 11, 1980, a report on the necessity for and the adequacy of the revenue raised, in relation to estimated future requirements, of the Post-closure Liability Trust Fund.

(b) Private insurance protection

The President shall conduct a study to determine (1) whether adequate private insurance protection is available on reasonable terms and conditions to the owners and operators of vessels and facilities subject to liability under section 9607 of this title, and (2) whether the market for such insurance is sufficiently competitive to assure purchasers of features such as a reasonable range of deductibles, coinsurance provisions, and exclusions. The President shall submit the results of his study, together with his recommendations, within two years of December 11, 1980 and shall submit an interim report on his study within one year of December 11, 1980.

(c) Regulations respecting assessment of damages to natural resources

(1) The President, acting through Federal officials designated by the National Contingency Plan published under section 9605 of this title, shall study and, not later than two years after December 11, 1980, shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33.

(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short-and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including

both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

(3) Such regulations shall be reviewed and revised as appropriate every two years.

(d) Issues, alternatives, and policy considerations involving selection of location for waste treatment, storage, and disposal facilities

The Administrator of the Environmental Protection Agency shall, in consultation with other Federal agencies and appropriate representatives of State and local governments and nongovernmental agencies, conduct a study and report to the Congress within two years of December 11, 1980, on the issues, alternatives, and policy considerations involved in the selection of locations for hazardous waste treatment, storage, and disposal facilities. This study shall include—

(A) an assessment of current and projected treatment, storage, and disposal capacity needs and shortfalls for hazardous waste by management category on a State-by-State basis;

(B) an evaluation of the appropriateness of a regional approach to siting and designing hazardous waste management facilities and the identification of hazardous waste management regions, interstate or intrastate, or both, with similar hazardous waste management needs;

(C) solicitation and analysis of proposals for the construction and operation of hazardous waste management facilities by nongovernmental entities, except that no proposal solicited under terms of this subsection shall be analyzed if it involves cost to the United States Government or fails to comply with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] and other applicable provisions of law;

(D) recommendations on the appropriate balance between public and private sector involvement in the siting, design, and operation of new hazardous waste management facilities;

(E) documentation of the major reasons for public opposition to new hazardous waste management facilities; and

(F) an evaluation of the various options for overcoming obstacles to siting new facilities, including needed legislation for implementing the most suitable option or options.

(e) Adequacy of existing common law and statutory remedies

(1) In order to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment, there shall be submitted to the Congress a study within twelve months of December 11, 1980.

(2) This study shall be conducted with the assistance of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General with the President of each entity selecting three members from each organization to conduct the study. The study chairman and one reporter shall be elected from among the twelve members of the study group.

(3) As part of their review of the adequacy of existing common law and statutory remedies, the study group shall evaluate the following:

(A) the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;

(B) the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;

(C) the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to—

(i) carcinogens, mutagens, and teratogens, and

(ii) the human health effects of exposure to low doses of hazardous substances over long periods of time;

(D) the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;

(E) the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;

(F) barriers to recovery posed by existing statutes of limitations.

(4) The report shall be submitted to the Congress with appropriate recommendations. Such recommendations shall explicitly address—

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

(5) The Fund shall pay administrative expenses incurred for the study. No expenses shall be available to pay compensation, except expenses on a per diem basis for the one reporter, but in no case shall the total expenses of the study exceed $300,000.

(f) Modification of national contingency plan

The President, acting through the Administrator of the Environmental Protection Agency, the Secretary of Transportation, the Administrator of the Occupational Safety and Health Administration, and the Director of the National Institute for Occupational Safety and Health shall study and, not later than two years after December 11, 1980, shall modify the national contingency plan to provide for the protection of the health and safety of employees involved in response actions.

§ 9652. Effective dates; savings provisions

(a) Unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980.

(b) Any regulation issued pursuant to any provisions of section 1321 of Title 33 which is repealed or superseded by this chapter and which is in effect on the date immediately preceding the effective date of this chapter shall be deemed to be a regulation issued pursuant to the authority of this chapter and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(c) Any regulation—

(1) respecting financial responsibility,

(2) issued pursuant to any provision of law repealed or superseded by this chapter, and

(3) in effect on the date immediately preceding the effective date of this chapter shall be deemed to be a regulation issued pursuant to the authority of this chapter and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

§ 9653. Termination of authority to collect taxes

Unless reauthorized by the Congress, the authority to collect taxes conferred by this chapter shall terminate on September 30, 1985, or when the sum of the amounts received in the Treasury under section 4611 and under 4661 of Title 26 total $1,380,000,000, whichever occurs first. The Secretary of the Treasury shall estimate when this level of $1,380,000,000 will be reached and shall by regulation, provide procedures for the termination of the tax authorized by this chapter and imposed under sections 4611 and 4661 of Title 26.

§ 9654. Applicability of Federal water pollution control funding, etc., provisions

(a) One-half of the unobligated balance remaining before December 11, 1980, under subsection (k) of section 1321 of Title 33 and all sums appropriated under section 1364(b) of Title 33 shall be transferred to the Fund established under subchapter II of this chapter.

(b) In any case in which any provision of section 1321 of Title 33 is determined to be in conflict with any provisions of this chapter, the provisions of this chapter shall apply.

§ 9655. Legislative veto of rule or regulation

(a) Transmission to Congress upon promulgation or repromulgation of rule or regulation; disapproval procedures

Notwithstanding any other provision of law, simultaneously with promulgation of repromulgation of any rule or regulation under authority of subchapter I of this chapter, the head of the department, agency, or instrumentality promulgating such rule or regulation shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in subsection (b) of this section, the rule or regulation shall not become effective, if—

(1) within ninety calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the rule or regulation promulgated by the dealing with the matter of which rule or regulation was transmitted to Congress on .", the blank spaces therein being appropriately filled; or

(2) within sixty calendar days of continuous session of Congress after the date of promulgation, one House of Congress adopts such a concurrent resolution and transmits such resolution to the other House, and such resolution is not disapproved by such other House within thirty calendar days of continuous session of Congress after such transmittal.

(b) Approval; effective dates

If, at the end of sixty calendar days of continuous session of Congress after the date of promulgation of a rule or regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule or regulation and neither House has adopted such a resolution, the rule or regulation may go into effect immediately. If, within such sixty calendar days, such a committee has reported or been discharged from further consideration of such a resolution, or either House has adopted such a resolution, the rule or regulation may go into effect not sooner than ninety calendar days of continuous session of Congress after such rule is prescribed unless disapproved as provided in subsection (a) of this section.

(c) Sessions of Congress as applicable

For purposes of subsections (a) and (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjourment of more than three days to a day certain are excluded in the computation of thirty, sixty, and ninety calendar days of continuous session of Congress.

(d) Congressional inaction on, or rejection of, resolution of disapproval

Congressional inaction on, or rejection of, a resolution of disapproval shall not be deemed an expression of approval of such rule or regulation.

§ 9656. Transportation of hazardous substances; listing as hazardous material; liability for release

(a) Each hazardous substance which is listed or designated as provided in section 9601(14) of this title shall, within ninety days after December 11, 1980, or at the time of such listing or designation, whichever is later, be listed as a hazardous material under the Hazardous Materials Transportation Act [49 U.S.C.A. § 1801 et seq.].

(b) A common or contract carrier shall be liable under other law in lieu of section 9607 of this title for damages or remedial action resulting from the release of a hazardous substance during the course of transportation which commenced prior to the effective date of the listing of such substance as a hazardous material under the Hazardous Materials Transportation Act [49 U.S.C.A. § 1801 et seq.], or for substances listed pursuant to subsection (a) of this section, prior to the effective date of such listing: *Provided, however*, That this subsection shall not apply where such a carrier can demonstrate that he did not have actual knowledge of the identity or nature of the substance release.

§ 9657. Separability of provisions

If any provisions of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby.

No. 84-978

In The

Supreme Court of the United States

October Term, 1984

EXXON CORPORATION; THE B. F. GOODRICH COMPANY; UNION CARBIDE CORPORATION; MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Appellants,

v.

ROBERT HUNT, Administrator of the New Jersey Spill Compensation Fund; CLIFFORD GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of the Department of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (also known as "Superfund"), 42 *U.S.C.* § 9601 *et seq.*, preempts the taxing provisions of the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 *et seq.*, which the New Jersey Legislature enacted in 1977 to finance the State's petroleum spill and hazardous waste site cleanup program?

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No. 84-978

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Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees Robert Hunt, Administrator of the New Jersey Spill Compensation Fund, *et al.*, respectfully move pursuant to Rule 16(1)(b) and (d) to dismiss this appeal or affirm the judgment of the Supreme Court of New Jersey because the issues presented do not raise substantial federal questions meriting plenary review by this Court, and because this case was correctly decided below in keeping with well-established preemption doctrine and the precedents of this Court.

COUNTER-STATEMENT OF THE CASE

In 1977 the New Jersey Legislature adopted the Spill Compensation and Control Act ("Spill Act"), *N.J.S.A.* 58:10-23.11 *et seq.*, to protect the citizens and environment of the State from damage resulting from discharges of petroleum and other hazardous substances. To finance the spill prevention and cleanup program created by the Spill Act, the Legislature imposed a tax upon major petroleum and chemical facilities. *N.J.S.A.* 58:10-23.11h; *see also N.J.S.A.* 58:10-23.11b(1) for the definition of "major facility." The tax was levied on a per barrel basis for petroleum, and on either a per barrel or percentage of fair market value basis for hazardous substances. *N.J.S.A.* 58:10-23.11h. The Spill Act provides for the revenues generated by the tax to be credited to the Spill Compensation Fund ("Spill Fund") which is authorized to finance, among other things, spill response costs incurred by the Department of Environmental Protection; property damage and loss of earnings claims resulting from hazardous discharges; the personnel and equipment costs of the Department of Environmental Protection associated with the enforcement of the Spill Act; and the administrative costs of the Spill Fund. *N.J.S.A.* 58:10-23.11g; *N.J.S.A.* 58:10-23.11o. From 1977 through 1980, the Spill Fund provided the primary source of revenue for New Jersey's petroleum spill and hazardous waste cleanup program.

At the end of 1980, however, Congress recognized that states acting alone could not adequately address the staggering problems associated with the release of hazardous substances into the environment. Consequently, Congress adopted the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), 42 *U.S.C.*

§ 9601 *et seq.*, to assist the states in financing cleanups at the most severely damaged and highest priority sites throughout the nation. Funding for this federal effort was provided by a 1.6 billion dollar trust fund to be raised over a five-year period by placing a tax on crude oil, petroleum, and certain chemicals, and by transferring to the Fund appropriations from general federal revenues. 26 *U.S.C.* § 4611 *et seq.*; 26 *U.S.C.* § 4661 *et seq.*; 42 *U.S.C.* § 9631. The tax was structured to provide 87.5% of the fund, while general revenues were to make up the balance.

Enacted as a compromise measure in the waning days of the 96th Congress, the Superfund Act as finally adopted drastically reduced the funding levels and coverage proposed in predecessor bills. Its direct precursors which formed the basis for the compromise were S. 1480, which provided $4.1 billion over six years for oil spill and hazardous substance release cleanups and third party damage claims including victim compensation; H.R. 85, which focused primarily on petroleum spill cleanups and also provided for the payment of claims resulting from property damage or economic loss; and H.R. 7020, which was directed at remedying abandoned hazardous waste dumpsites. Although the Superfund Act grew out of these earlier bills, it did not authorize compensation for third party damage claims, excluded petroleum spills from coverage altogether (42 *U.S.C.* § 9601(14)), and reduced the size of the fund from over $4 billion to $1.6 billion. 126 *Cong. Rec.* 30932 (1980) (remarks of Senator Randolph). The compromise thus eliminated approximately "75 percent" of what initially had been proposed. 126 *Cong. Rec.* 30935 (1980) (remarks of Senator Stafford).

In recognition of the reduced federal program brought about by the legislative compromise, and certainly in rec-

ognition of the enormous remedial capability that must be developed to address the nation's staggering hazardous substance pollution problem, Congress designed the Superfund Act to encourage a joint federal and state response to toxic contamination. The statutory scheme thus provided a cooperative federalism approach through which states were encouraged to work together with the federal government. The importance of state participation in implementing the Superfund law is evident throughout the Act. *See* 42 *U.S.C.* § 9604(c) which provided that the federal government must consult with an affected state before determining appropriate remedial action, and required states to guarantee as a prerequisite to receiving federal funds: (1) all future maintenance at sites where removal and remedial actions were undertaken; (2) the availability of a hazardous waste disposal facility for the off-site storage or treatment of hazardous substances; and (3) payment of 10% or more of the total costs of remedial operations. *See also* 42 *U.S.C.* § 9604(d)(i) and 42 *U.S.C.* § 9614(a). It is abundantly clear, therefore, that Congress envisioned active state financial, technical, and administrative support as an integral part of the nationwide effort to eradicate hazardous substance pollution from the United States.

State participation is essential for the program to work. It is well-recognized that the money provided in the Superfund Act to launch the Federal program falls far short of the amount needed to remedy the hazardous waste problem in this country. In S. Rep. No. 848, 96th Cong., 2d Sess. at 17, for example, it was noted in reference to the then-proposed six-year, $4.1 billion Superfund that such an allotment " . . . will permit government response

only to the most significant releases. At this level of funding, response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment." These comments are even more striking when viewed in light of the level of funding actually supplied by Superfund which, as noted earlier, provided for only about 30% of the amount of money once deemed minimally necessary. A similar conclusion as to the insufficiency of federal funding under the Act can be drawn from H.R. Rep. No. 96-1016, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News 6119, 6123, which noted that in 1979 EPA estimated that it would cost between $13.1 and $22.1 billion to clean up all the known inactive and uncontrolled hazardous waste sites in the nation. Given this limited federal funding—limited to the extent that it fell far short of covering projected needs—the role of each individual state became critical to the achievement of the ameliorative goals of the Superfund Act.

Although Congress recognized the importance of the state role, it was concerned that states would levy taxes on the chemical and petroleum industries to finance state programs that merely duplicated federal efforts. Congress consequently included the following provision in § 114(c) of the Superfund Act:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to

> finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State. [42 *U.S.C.* § 9614(c)]

Before enactment of the above provision, Senator Bill Bradley of New Jersey became concerned about its impact on the continued operation of the State's hazardous waste cleanup program. In the course of debate on the Superfund measure, he questioned Senator Jennings Randolph of West Virginia, a sponsor of the Superfund effort and Chairman of the Committee on Environment and Public Works which had reported the bill to the Senate, as to the future of state taxes on industry to fund hazardous waste cleanup programs if the foregoing provision were adopted. Included in the colloquy between the two senators were the following remarks:

MR. RANDOLPH. * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill.

* * *

Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a State may make of its money, nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

MR. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?

MR. RANDOLPH. That is correct.

MR. BRADLEY. Am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

MR. RANDOLPH. That is correct.

MR. BRADLEY. Finally, if the Federal Government determines that the needs at other sites require that Federal efforts be terminated at the first site before that site is completed, may a State fund complete the effort?

MR. RANDOLPH. This legislation would permit that to happen. [126 Cong. Rec. 30949 (1980)].

Given the narrow scope of the language used in § 114(c) and the guidance of the foregoing colloquy, once the Superfund Act was adopted New Jersey began to administer the Spill Act to supplement rather than to duplicate federal cleanup efforts. The State had the flexibility to adapt its program in this way because the New Jersey Legislature had vested broad discretion in the Department of Environmental Protection to select the type and extent of cleanup and related activities to be financed by the Spill Act tax. *N.J.S.A.* 58:10-23.11f. In the post-Superfund era, therefore, New Jersey has sought to maximize the infusion of federal dollars into the State for cleanup activities. As a consequence, 85 New Jersey sites have been nominated to the priority list of approximately 535 sites maintained by the United States Environmental Protection Agency ("EPA") pursuant to 42 *U.S.C.* § 9605, and used

as a prerequisite to establishing eligibility for Superfund-financed remedial activity. 40 *C.F.R.* § 300.68; *see also* Appendix B to 40 *C.F.R.* Part 300.

Following the adoption of the Superfund Act, however, New Jersey's right to continue the collection of the Spill Fund tax was challenged by the Exxon Corporation and four other owners of "major facilities" responsible for paying the tax (referred to collectively as "Exxon") on the sole ground that *N.J.S.A.* 58:10-23.11h was preempted by the language contained in § 114(c) of the Superfund Act, codified at 42 *U.S.C.* § 9614(c). Following an unsuccessful attempt to raise this challenge in federal court (*see Exxon Corp. v. Hunt,* 683 *F.*2d 69 (3d Cir. 1982), *cert.* denied 439 *U.S.* 1104 (1983)), Exxon pursued the matter through the New Jersey court system. Upon reviewing cross motions for summary judgment on the merits, the Tax Court of New Jersey upheld the validity of the Spill Fund tax. *Exxon Corp. v. Hunt,* 4 *N.J. Tax* 294 (1982) (reprinted in the appendix attached to Appellant Exxon's Jurisdictional Statement ("Aa") at Aa47 to Aa78). This determination was subsequently affirmed by both the Appellate Division of the Superior Court, *Exxon Corp. v. Hunt,* 190 *N.J. Super.* 131, 462 *A.*2d 1983 (App. Div. 1983) (reprinted at Aa37 to Aa46), and by the Supreme Court of New Jersey, *Exxon Corp. v. Hunt,* 97 *N.J.* 526, 481 *A.*2d 271 (1984) (reprinted at Aa15 to Aa36).

In upholding the Spill Fund tax against Exxon's challenge, the Supreme Court of New Jersey followed the traditional approach established by this Court in preemption cases which requires ascertaining the meaning of the

federal and state enactments in question, and then determining whether they are in conflict. *Exxon v. Hunt, supra,* 97 *N.J.* at 533 (Aa23), citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 *U.S.* 311, 317 (1981); *Perez v. Campbell,* 402 *U.S.* 637, 644 (1971); and *Florida Lime & Avocado Growers v. Paul,* 373 *U.S.* 132, 142 (1963). Pursuant to this well-established approach, the court below carefully examined the language of § 114(c), legislative history directly pertinent to that provision, and the purpose and spirit of the Superfund Act as a whole. This painstaking analysis persuaded the court that § 114(c) did not preempt New Jersey's right to tax industry to support Spill Fund activities, as long as the State tax was used to supplement and not to duplicate federal cleanup efforts.

While the Supreme Court of New Jersey did consider the plain meaning argument advanced by Exxon, it rejected the argument because the language of § 114(c) was not sufficiently clear on its face to support the extremely broad preemption interpretation urged by Exxon. The court consequently looked to contemporaneous legislative history concerning the preemption provision, and found ample support there for a much narrower construction of § 114(c)—a construction that would allow the New Jersey and federal taxes to coexist. *See* the Bradley/Randolph colloquy quoted above and cited in *Exxon v. Hunt, supra,* 97 *N.J.* at 538-540 (Aa28 to Aa30). Recent legislative history confirming this interpretation was also cited by the court below (Aa31 to Aa32), as was an agency construction to the same effect issued by EPA in a guidance docu-

ment provided to the states as part of Superfund program implementation (Aa32 to Aa33). This cumulative and compelling support for a narrow interpretation of § 114(c) convinced the court that Congress had not intended to vitiate New Jersey's hazardous waste cleanup program by cutting off its source of financing.

Also found persuasive by the court below, however, was the federal statutory scheme itself which focused on priority sites to the exclusion of other problem areas. *See* 42 *U.S.C.* § 9605; 40 *C.F.R.* § 300.68. In light of this limited federal coverage, the Supreme Court of New Jersey echoed the conclusion of the Tax Court which had found that "[i]t simply strains credulity to say that hazardous waste sites and spills not meeting the [priority list] criteria are claims which 'may be compensated' under [Superfund]." 97 *N.J.* at 543 (Aa34). Based on this realistic analysis of Superfund coverage, the court below rejected Exxon's broad preemption claim and endorsed "The more logical conclusion . . . that Congress contemplated that the federal government would attempt to deal with the problems of the most seriously affected sites . . . and to allow states to maintain a compensation fund . . . to conduct their own cleanup efforts on those sites not receiving Superfund compensation and to provide for their cooperative program components including their 10% share of cleanup costs, related administrative costs for equipment and personnel, and other program features not covered by Superfund. . . ." 97 *N.J.* 543-544 (Aa35).*

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* Since the adoption of the Superfund Act, New Jersey has administered its Spill Fund in a manner consistent with the ruling of the Supreme Court of New Jersey. Thus, the proceeds

(Continued on next page)

Dissatisfied with this result, Exxon filed a Notice of Appeal from the judgment of the Supreme Court of New Jersey on November 19, 1984. Exxon's Jurisdictional Statement was submitted thereafter. Appellees Hunt and the State of New Jersey, *et al.* urge this Court to dismiss the appeal for want of a substantial federal question meriting plenary review, or to affirm the judgment issued in this matter by the Supreme Court of New Jersey. In support of this motion, appellees rely upon this brief and the opinions rendered by the courts below.

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ARGUMENT

Plenary Review Of This Appeal Is Not Warranted Because The Supreme Court Of New Jersey Correctly And Convincingly Rejected The Preemption Argument Raised By Exxon After Applying Well-Established Principles Of Statutory Construction And Preemption Analysis To The Particular Circumstances Of This Case.

This appeal should be dismissed, or the opinion below affirmed, because the Supreme Court of New Jersey carefully followed the methods established by this Court for

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(Continued from previous page)

of the Spill Fund have accordingly been used to finance the State's 10% or greater share of remedial costs at priority sites selected for cleanup work by EPA, to finance site cleanups where no federal funding has been made available, to finance personnel and equipment costs incurred by the Department of Environmental Protection in enforcing the Spill Act, and to finance the administrative expenses of the Spill Fund. To the extent that appellants assert otherwise (Jurisdictional Statement at p. 4), they are plainly wrong; in any event, there is nothing in the record of this case to support their assertions.

analyzing preemption cases and correctly determined, upon a detailed examination of the statutory language, legislative history, and statutory scheme as a whole, that § 114(c) of the Superfund Act, 42 *U.S.C.* § 9614(c), did not invalidate the tax levied by New Jersey to support the State's hazardous discharge prevention and cleanup program. Plenary review is also unnecessary here because the conflicts alleged by Exxon between the decision below and the precedents of this Court, and between the federal and state statutes in question, are imagined rather than real, as demonstrated below.

A. The Approach Used by the Supreme Court of New Jersey to Analyze the Preemption Issue in this Case is Completely Consistent With the Precedents of this Court.

The primary thrust of preemption analysis is to determine the intent of Congress in enacting the federal statute in issue. *Shaw v. Delta Air Lines, Inc.*, 103 *S.Ct.* 2890, 2899 (1983); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 *U.S.* 141, 152 (1982). For until that intent is ascertained, it is impossible to decide whether the state enactment "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and thus must be invalidated under the Supremacy Clause. *Jones v. Rath Packing Co.*, 430 *U.S.* 519, 526 (1977), quoting *Hines v. Davidowitz*, 312 *U.S.* 52, 67 (1941). The Supreme Court of New Jersey recognized and gave effect to this key element of preemption doctrine in its opinion below which liberally cited and carefully followed the precedents of this Court. In an effort to support the granting of plenary review here, however, Exxon has alleged that the Supreme Court of New Jersey "disregarded" settled

preemption principles in upholding the Spill Fund tax. This allegation—based on an illusory conflict between the decision below and this Court's opinion in *Aloha Airlines v. Div. of Taxation of Hawaii*, 104 *S.Ct.* 291 (1983)—is a sheer makeweight, however, and thus cannot sustain Exxon's request for plenary review.

The *Aloha Airlines* opinion noted that courts need not look beyond the plain meaning of a statutory provision where preemption is alleged *if* the federal enactment in question clearly and unambiguously forbids a particular type of state action, and precisely that kind of action is under attack. 104 *S.Ct.* at 294. The key to this holding—and to the plain meaning rule in general—is that the federal statutory provision must be completely free from ambiguity on its face, and must operate independently of the rest of the statute. Even Exxon recognizes that these essential prerequisites must be met before the plain meaning rule can properly be invoked. (Jurisdictional Statement at 8).

After acknowledging these requirements, however, Exxon proceeds to ignore them. For § 114(c) automatically falls beyond the scope of the plain meaning rule because it is ambiguous on its face. First, the provision is not self-defining like the statutory section in issue in *Aloha Airlines*, but rather explicitly refers to the balance of the Superfund Act for a complete understanding of its terms. Moreover, § 114(c) does not categorically prevent the states from taxing industry to support all hazardous waste cleanup programs, as Exxon would have this Court believe, but only from taxing persons "to pay compensation for claims . . . which may be compensated under this subchapter." 42 *U.S.C.* § 9614(c). Resort to the rest of the

Superfund Act at the very least is consequently necessary to determine the extent of federal coverage and—derivatively—to determine the extent of federal preemption. Yet, Exxon has persistently refused to recognize this fact. Finally, application of the plain meaning rule would be inappropriate here in any event because the word "may" is used in § 114(c)—a word that has had many different meanings ascribed to it and thus is inherently ambiguous. *See generally Kraft v. Board of Educ. for D.C.*, 247 *F. Supp.* 21, 24-25 (D.D.C. 1965), *cert.* denied 386 *U.S.* 958 (1967); *Webster's Third New International Dictionary* at 1396 (1971); *Webster's New Collegiate Dictionary* at 711 (1976); *Black's Law Dictionary* at 883 (rev. 5th ed. 1979). Given these facial ambiguities in § 114(c), *Aloha Airlines* does not support the position advanced by Exxon. The alleged "conflict" between that decision and the opinion below must consequently be seen for what it really is: an attempt to create a conflict where none exists.

As is painfully obvious from an examination of the instant matter, Exxon argues so strenuously for application of the plain meaning rule because it wants to prevent the Court from considering the Bradley/Randolph colloquy that undermines Exxon's position in this litigation and supports the narrow reading of § 114(c) endorsed below. While Exxon's effort in this regard is understandable, it is not valid. For none of the cases cited by Exxon authorize courts to exclude pertinent legislative history from consideration. Indeed, even in *Aloha Airlines* the Court discussed the legislative history of the federal enactment and relied upon it to support a determination of congressional intent. 104 *S.Ct.* at 294-295. Similar reliance on relevant legislative history can be found in two

additional cases cited by Exxon as purported support for its misguided "plain meaning" argument: *Ernst & Ernst v. Hochfelder*, 425 *U.S.* 185 (1976); and *Arizona Public Serv. Co. v. Snead*, 441 *U.S.* 141 (1979).

When the Supreme Court of New Jersey relied upon contemporaneous legislative history that was directly pertinent to the preemption issue in question here, therefore, it adhered to the precedents established by this Court. Moreover, contrary to Exxon's assertions, use of the views of a subsequent Congress by the court below to confirm legislative intent was also appropriate. *See Bell v. New Jersey and Pennsylvania*, 461 *U.S.* 773 (1983); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 *U.S.* 572, 596 (1980). So, too, was reliance on a Superfund program guidance document addressing the preemption question issued by the United States Environmental Protection Agency. *See Youakim v. Miller*, 425 *U.S.* 231, 235-236 (1976). Since all of Exxon's objections to the approach utilized by the Supreme Court of New Jersey to analyze the preemption issue are without merit, plenary review to address these objections is completely unwarranted.

B. The Supreme Court Of New Jersey Correctly Concluded That The Preemption Clause Of The Superfund Act Is Narrow In Scope And Permits New Jersey To Continue Its Spill Fund Tax As Long As The Revenues Collected Are Dedicated To Financing Spill Fund Program Costs Not Covered Or Actually Compensated by Superfund.

Before sustaining the validity of the Spill Fund tax against Exxon's preemption challenge, the Supreme Court of New Jersey carefully analyzed the State and federal

enactments and determined that no irreconcilable conflict existed between the two regulatory schemes. It found ample support for the conclusion that the statutes could be harmonized in the language of § 114(c), in the Superfund Act as a whole, in the legislative history of the Act, and in the operation of the federal program by the United States Environmental Protection Agency. A review of each of these elements of the decision below will demonstrate that the Supreme Court of New Jersey properly upheld the Spill Fund tax, and that plenary review by this Court is consequently unnecessary.

Section 114(c), by its own terms, restricts state taxation only insofar as revenues are used for costs that "may be compensated under this subchapter." It is completely consonant with this language, therefore, for states to tax industry for activities excluded from coverage by Superfund. As a consequence, there is no preemption whatsoever of state taxation to finance state program costs that are not eligible for Superfund financing. For what Congress did in § 114(c) was to relate the restriction on state taxation to the areas it chose to cover on the federal level, leaving large untouched areas to be proper objects of state taxation and spending. When Congress circumscribes its coverage in this way, "state regulation outside that limited field . . . is not forbidden or displaced." *Kelly v. State of Washington*, 302 *U.S.* 1, 10 (1937). *See also Shaw v. Delta Air Lines, Inc., supra*, 103 *S.Ct.* at 2900 (state anti-discrimination employment law preempted only insofar as it related to pension plans covered by ERISA and thus continued to apply to other aspects of the employment relationship such as hiring, promotions, and salaries).

The New Jersey Spill Act provides financing for many categories of costs that are not eligible for federal Superfund compensation. These categories include the cost of remedying petroleum spills, the payment of third party property damage claims, the personnel and equipment expenses incurred by the Department of Environmental Protection in operating the State spill program, and the administrative costs of the Spill Fund. *N.J.S.A.* 58:10-23.11o; *compare* 42 *U.S.C.* § 9601 *et seq.* The State legislation also provides financing, as the courts below held, for cleanup costs at discharge sites of local but not national significance and thus beyond the scope of Superfund, and for the ten percent or greater state match at priority sites—a contribution that specifically cannot be paid by federal funds. 42 *U.S.C.* § 9604(c). In regard to the State match, the New Jersey Legislature explicitly recognized that the Spill Fund should be used for this purpose when it enacted the Hazardous Discharge Bond Act, *P.L.* 1981, *c.* 275, which provided that bond moneys could be used for the match if resources in the Spill Fund were insufficient. *Ibid.* at section 15. Since none of the above categories are covered by Superfund, it is clear that New Jersey may continue to tax industry for these purposes.

Exxon maintains to the contrary, however, that the only permissible state tax would be one dedicated solely to the exemptions authorized in the second sentence of § 114(c) (Jurisdictional Statement at 8). Such a reading would severely restrict a state's right to tax industry by requiring that all revenues derived from the tax be used "to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which

aff cts such State." 42 *U.S.C.* § 9614(c). Exxon's argument fails because it simply refuses to recognize the express language of § 114(c) which limits the preemptive scope of the provision to areas covered by the federal Act and leaves other areas open to regulation by the states. It also fails because the argument is contrary to the legislative intent. *See* 126 *Cong. Rec.* 30949 (1980) (remarks of Senators Randolph and Bradley); 126 *Cong. Rec.* 31965 (1980) (remarks of Representative Florio). The court below thus correctly concluded that § 114(c) did not preempt the Spill Fund tax as long as the revenues derived therefrom were used to compensate hazardous waste cleanup costs and claims not covered by Superfund.

While the areas of Spill Fund spending that fall beyond the scope of federal coverage would alone sustain the validity of the New Jersey tax, the Supreme Court of New Jersey also held that the State tax could be used to finance costs "not in fact compensated by Superfund moneys." 97 *N.J.* at 543 (Aa35). This conclusion was based on a pragmatic analysis of the federal and state programs that followed the directive of *Jones v. Rath Packing Co., supra,* 430 *U.S.* at 526, which required courts addressing preemption problems "to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written."

The key to determining the impact of § 114(c) on New Jersey's financing scheme for the Spill Fund program is to ascertain what activities may be paid for on the federal level under the provisions of the Superfund Act. Although this question is at the crux of the instant case, Exxon never addresses it, but rather assumes that the

Superfund Act makes compensation available for any and all hazardous waste cleanup actions and related expenses. Such an assumption ignores the limited coverage provided by the federal act and substitutes superficial, conclusory allegations for a close examination of the statutory and regulatory aspects of Superfund. When the Superfund program is analyzed carefully, however, it supports the holding reached by the court below and not the simplistic argument advanced by Exxon.

The Superfund Act provided that all response actions to releases of hazardous substances be consistent with the National Contingency Plan for the removal of oil and hazardous substances ("NCP"). 42 *U.S.C.* § 9604(a). The Act also directed that the existing NCP be revised to include criteria for determining priorities among problem sites throughout the United States. 42 *U.S.C.* § 9605 (8)(A). Based upon these criteria, the federal government must select—with input from the states—the worst sites in the country for inclusion on the National Priority List ("NPL"). 42 *U.S.C.* § 9605(8)(B). In order to qualify for federally financed remedial action, a release must be on the NPL. This requirement drastically restricts the number of sites where federal funding will even be considered. Superfund's focus upon the worst sites nationwide is consistent with the legislative history of the Act which recognized that the funding limitations of the federal program would make responses possible only at the most severely damaged sites. *See, e.g.,* S. Rep. No. 848, 96th Cong., 2d Sess. at 17; [1980] U.S. Code Cong. & Ad. News at 6139 (comments of Representative Gore); 126 *Cong. Rec.* 30940 (1980) (remarks of Senator Tsongas).

EPA, the federal agency charged with implementing the Superfund program, has elaborated on the Act's restricted coverage in the NCP. *See* 40 *C.F.R.* Part 300. That document specifically provides that remedial actions will be authorized only for releases on the NPL. 40 *C.F.R.* § 300.68(a). It is important to note, however, that inclusion on the NPL does not guarantee that compensation will be provided, but merely constitutes the first step toward qualifying for Superfund financed remedial action. As to the question of eligibility for funding, EPA has analyzed the NCP in the following manner:

> Subpart F establishes criteria upon which decisions as to eligibility for Federal funding will be based. The eligibility of particular actions will be decided on a case-by-case basis using these factors. The Plan cannot ensure funding approval for specific actions since current demands for response and expected future demands exceed available funds. [47 Fed. Reg. at 31195 to 31196 (July 16, 1982)]

See also Ibid. at 31187 where EPA noted that inclusion on the NPL did not guarantee eventual federal funding.

Since eligibility for Superfund financing is determined on a case by case basis, the only way to ascertain whether a particular site may receive compensation under the federal act is to make an application to EPA. If that site is not included on the NPL, or if included is rejected for financing, states should be permitted to use industry taxes to fund remedial action there because such work may not realistically be compensated by Superfund. Given EPA's case by case approach to eligibility, the "actual compensation" test endorsed by the Supreme Court of New Jersey is the only practicable way to interpret § 114(c).

Although Exxon argues that this narrow construction of § 114(c) renders the provision meaningless, this is not so. For what the actual compensation test requires of states that want to collect industry taxes is that they maximize their participation in the federal program by applying for compensation whenever a site has a reasonable chance to meet the criteria established in the NCP. A state could not ignore the federal program and then tax industry for any and all cleanup work in order to avoid federal entanglements and regulatory requirements, therefore, because such action would in essence lead to state taxation for work that could have been financed under Superfund—just the kind of double taxation and duplication of program goals proscribed by § 114(c). Should a state wish to pursue such a course, it would be required to fund an independent cleanup program through general revenues, as allowed by the second sentence of § 114(c). If a state chooses to use an industry tax to supplement federal cleanup efforts within its borders by financing remedial action where no Superfund compensation has been provided, however, this type of program is permissible under § 114(c).

While Exxon argues that the Supreme Court of New Jersey substituted its will for that of Congress when it endorsed the "actual compensation" test, this is not the case. For the test comes directly from the Bradley/Randolph colloquy quoted extensively above at pp. 6-7. There Senator Randolph stated unequivocally that § 114(c) would not preempt state taxation for activities eligible for federal financing, but where no Superfund reimbursement was actually provided. 126 *Cong. Rec.* 30949 (1980). Since Senator Randolph was a co-sponsor of the Superfund Act and Chairman of the Committee on Environment

and Public Works which referred the measure to the Senate, his remarks are entitled to great weight, as the Court below held. *Exxon v. Hunt,* 97 *N.J.* at 537 (Aa27), citing *F.E.A. v. Algonquin SNG, Inc.,* 426 *U.S.* 548, 564 (1976). Substantial deference should also be accorded to the Randolph comments because they were prompted by the situation in New Jersey and thus have a direct bearing on the issue raised in this case. Further congressional support for the "actual compensation" test can be found in a recent report of the House of Representatives Committee on Energy and Commerce which stated in regard to the Superfund Act that, "The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund." H.R. Rep. No. 890, Part 1, 98th Cong., 2d Sess. 58-59 (1984). While the views of a subsequent Congress are not always determinative of earlier legislative intent, they are persuasive here because they confirm the interpretation of § 114(c) contained in the Bradley/Randolph colloquy. Also of note is that the Committee explicitly rejected the broad preemption interpretation of § 114(c) advocated by Exxon. *Ibid.*

The "actual compensation" test has also been endorsed by EPA, the federal agency charged with implementing the Superfund Act. In a guidance document concerning the state role in the Superfund implementation process, EPA addressed the preemption issue and concluded that § 114(c) did not apply to state funds used "to compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by

the Fund but for which no federal reimbursement is provided." *Office of Emergency and Remedial Response, U.S. Environmental Protection Agency, Guidance: Cooperative Agreements and Contracts with States Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980,* at p. x (March 1982). By following the interpretation of § 114(c) endorsed by both Congress and EPA, the Supreme Court of New Jersey did not engraft its own policy judgments upon the Superfund statute as Exxon contends, but rather gave full effect to the will of Congress and the views of EPA. Exxon's criticism of the opinion below is thus lacking in substance and does not merit plenary review by this Court.

As is abundantly clear from the decision of the Supreme Court of New Jersey and from the above analysis supporting the conclusions reached below, the State Spill Fund tax and the federal Superfund law can coexist without offending congressional objectives. Where such harmony is possible, the state statute must be upheld. *Florida Lime & Avocado Growers v. Paul, supra,* 373 *U.S.* at 141-143. Hypothetical or illusory conflicts such as those posited by Exxon simply are not sufficient to support a finding of preemption; actual conflict between the state and federal legislation must be demonstrated. *Rice v. Norman Williams Co.,* 458 *U.S.* 654 (1982); *Goldstein v. California,* 412 *U.S.* 546 (1973). Given the absence of any real conflict in this case, the decision upholding the State enactment should be affirmed, or the appeal filed by Exxon dismissed for lack of a substantial federal question.

———o———

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

Respectfully submitted,

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DATED: January 30, 1985

(3)

No. 84-978

IN THE

Supreme Court of the United States

OCTOBER TERM 1984,

EXXON CORPORATION, THE BFGOODRICH COMPANY; UNION CARBIDE CORPORATION; MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Appellants,

v.

ROBERT HUNT, Administrator of the New Jersey Spill Compensation Fund; CLIFFORD GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of the Department of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS REPLY BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM

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ARGUMENT

The argument offered by New Jersey in response to appellants' jurisdictional statement faithfully follows the approach of the New Jersey Supreme Court in this case. The State argues that unless "the federal enactment in question clearly and unambiguously forbids a particular type of state action" (N.J. Br. 13), State courts in resolving preemption issues are free to adopt "a pragmatic analysis," which "consider[s] the relationship between state and federal laws as they are interpreted and applied, not merely as they are written" (id. at 18). *See Also id.* at 13: "[T]he federal statutory provision must be completely free from ambiguity on its face, and must operate independently of the rest of the statute."[1]

The obligation of State courts in preemption cases like the present one, where Congress has on the face of the statute preempted State action, does not extend beyond looking at the plain language of the federal statute. By contrast, all the cases upon which the lower court relied to justify a "pragmatic" approach involved situations where Congress had been silent and where courts were required to reconcile potentially conflicting State and federal statutory schemes. (J.S. 23a). This is the teaching of *Aloha Airlines, Inc. v. Director of Taxation*, 104 S. Ct. 291, 294 & n.5 (1983), which was called to the New Jersey

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[1] Compare the holding of the New Jersey Supreme Court below:

"[C]ourts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible. 'Pre-emption of state law by federal statute is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained," ' " (Jurisdictional Statement, J.S. 23a) (citations omitted).

"The pertinent language of section 114(c) . . . may appear to be clear *language* at first glance, but we can hardly conclude that it conveys a clear and unambiguous *meaning* in light of the purpose and spirit of Superfund as a whole. We are reminded of Judge Learned Hand's ubiquitous observation of some 40 years ago:

> There is no surer way to misread any document that to read it literally***."

Id. at 24a (emphasis in original).

Supreme Court's attention by appellants but studiously ignored below.

* * *

New Jersey, like the court below, addresses appellants' statutory argument as though it turns entirely on the "plain meaning" of the term "may be compensated" as used in § 114(c) of Superfund, 42 U.S.C. § 9614(c). Playing upon the purported ambiguity of that term (N.J. Br. 14), the State argues that the phrase should be read as though it means "is actually compensated." In New Jersey's view, § 114(c) only preempts the creation of State spill funds that are used to pay for cleanups and other claims that are actually compensated by Superfund (N.J. Br. 20-21).

The meaning of the term "may be compensated" is, standing alone, sufficient to require a rejection of the "is actually compensated" reading embraced by New Jersey and the court below. While initially acknowledging that the phrase at issue in this case is "may be compensated" (connoting possibility), the New Jersey Supreme Court quickly turned its attention to an analysis of the word "may." (J.S. 24a-25a). In a line of cases dealing with the delegation of ministerial duties (in which the permissive "may" has been read as the mandatory "shall" to save the constitutionality of the particular delegation at issue), the New Jersey Supreme Court found support for its determination that the meaning of "may be compensated" in § 114(c) is unclear on its face. Once again, appellants contend that whatever ambiguity may attach to the word "may" in the context of ministerial delegation, there is no basis for reading a similar ambiguity into the very different phrase "may be."

Appellants' argument, however, does not stand merely upon the "plain meaning" of the term "may be compensated." Instead, it rests upon the much broader premise that § 114(c) must be construed so as to have some meaning, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), whereas New Jersey's construction renders § 114(c) virtually meaningless and comports with the holding of the New Jersey Supreme Court that "[t]he underlying intent of Superfund, as well as the legislative

history, mandates a conclusion of *no preemption*" (J.S. 36a) (emphasis added).

The preceding section of Superfund, § 114(c), 42 U.S.C. § 9614(b), provides that: "[a]ny person who receives compensation . . . pursuant to [Superfund] shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law." It is this section of the Act which guards against the danger of duplicate compensation. New Jersey's interpretation of § 114(c)—that it merely prevents State fund compensation of that which is actually compensated by Superfund—thus renders the section superfluous.

Moreover, § 114(c) provides that, although States are preempted from requiring a limited class of taxpayers, such as those who bear the burden of Superfund, to contribute to a fund whose purpose is to pay costs, damages or claims "which may be compensated under" Superfund, "[n]othing in this section shall preclude any State from using general revenues for such a fund. . . ." Thus, Congress envisioned that there could be some expenditures funded by general revenues for these purposes. But if New Jersey's "actual compensation" approach is accepted, no such funds from whatever source could ever be tapped, since § 114(b) prohibits the double compensation which the State claims is the only evil at which § 114(c) is aimed.

Finally, Congress found it necessary in § 114(c) to make it explicit that:

> Nothing in this section shall preclude any State from . . . imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

This disclaimer as to the scope of the preemption clause also has no meaning if New Jersey's view of the matter is adopted. Unless Congress intended § 114(c) to broadly preempt taxes or fees upon particular persons or substances to pay cleanup claims,

there was no reason for it to make clear that such special taxes or fees could be used for this limited purpose.

Had the New Jersey Supreme Court followed *Aloha Airlines*, it would have been forced to deal with the statute as Congress wrote it, rather than search for a "pragmatic" result that purported to reconcile the New Jersey and federal taxing schemes but, in fact, restructured the funding mechanism established by Congress for hazardous waste cleanup throughout the nation.

* * *

New Jersey, again like the court below, places heavy reliance upon a small, edited portion of the exchange between Senators Bradley and Randolph on the Senate floor regarding the scope of the preemption clause. Senator Randolph's initial description of the scope of § 114(c) is consistent with the view of the statute which appellants have taken:

> [i]t is not a prohibition on the uses that a State may make of its money nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase or pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

(N.J. Br. 6). However, in the course of giving brief answers to a set of prepared questions asked by Senator Bradley of New Jersey, Senator Randolph then offered a view of the statute that has been used by the State to support its position, *id.* at 6-7, by taking it out of context.[2]

This brief exchange between the two Senators is a very tenuous ground upon which to rest construction of the statute, particularly when it renders the preemption provision meaningless.

[2] The State chose to omit the next sentence of Randolph's reply: "Thus, the State cannot receive a fee or a tax on a substance if that fee or tax is to go into a fund and the fund is for the purpose of paying oil spill damage claims." (Superfund does not cover cleanup of oil spills). Also omitted is an immediate earlier reference by Senator Randolph to the 180 day period before preemption became effective (preemption under Superfund took place immediately upon enactment of the statute).

As this Court has held, legislative debates "are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body" because they are merely "expressive of the views and motives of the individual members." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). *See also* 2A Sutherland, *Statutory Construction* § 48.13 (4th ed. 1973). In fact, the overwhelming weight of the legislative history of Superfund and its predecessor bills, including committee reports, support the plain meaning of § 114(c) urged by appellants.

It is clear from the language of Superfund that one of the concerns of Congress in enacting the statute, and imposing an excise tax thereunder, was the effect such levy would have on the ability of the taxed products to be competitive with the products of foreign nations, 42 U.S.C. § 9651. Additionally, Congress was concerned with the burden that existing and possible future state funds would place on interstate and international trade involving these products. This was specifically recognized by Senator Cannon, the actual sponsor of § 114(c), in the Senate debate at the time of the passage of Superfund, when he stated:

> We are extremely pleased that this matter has been worked out. I strongly support the goal of making our environment safer from pollution by hazardous substances, but this goal must be carried out carefully in order not to have unintended and potentially disastrous impacts on the commerce of this country. It is for that reason we drafted and submitted amendments responding to concerns raised in Commerce Committee hearings.

126 Cong. Rec. 14981-82 (daily ed. Nov. 24, 1980).

One of the amendments the Senator was referring to provided the basis for § 114(c). It brought S 1480, the Senate predecessor of Superfund, into conformity with HR 85, the House version, with regard to preemption of duplicative state taxes. The explanation accompanying Senator Cannon's preemption amendment clearly indicates that its purpose was to prevent States from burdening interstate commerce with the cost of overlapping and duplicative spill tax systems. It was concluded that without preemption of such state taxing authority, interstate transporters would face the uncertainty of being subjected to differing requirements in every state. This congressional

determination, as expressed in § 114(c), was clearly within the power granted to Congress under the Commerce Clause. *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 150 (1979).

The EPA guidance memorandum cited by the State offers even more treacherous ground for embracing a construction of the statute which robs the preemption provision of any meaning. First of all, the language of this document is totally ambiguous, providing little or no aid in interpreting the statute. While EPA has been given very substantial responsibilities to implement Superfund, it has neither the authority nor incentive to protect Congress' purpose to spare the small group of taxpayers focused upon by federal Superfund from being subjected to similar special taxes in the states. To the contrary, EPA's interest is in finding financial support for site clean-up from all possible sources and it is not likely to be sensitive to such congressional concerns.

As was pointed out in appellants' jurisdictional statement, resort to post-hoc statements of legislative committees years after passage of the legislation under scrutiny never constitutes a sound basis upon which to construe a statute. (J.S. at 14). *A fortiori*, it should not be relied upon to rob the earlier statute of all possible meaning.

* * *

Finally, in a footnote at pp. 10-11 of its brief, the State asserts that New Jersey has administered the Spill Fund in a manner consistent with the New Jersey Supreme Court's ruling. The State goes on to assert that Superfund proceeds have been spent to finance personnel, equipment and administration costs, the State's matching share on Superfund-covered sites, and cleanups where no federal funding is available. Initially it must be recognized that this entire contention is irrelevant, because § 114(c) prohibits taxing, not spending. However, the appellants bring to the Court's attention evidence in the record below which belies the State's assertion that there is no actual conflict between the New Jersey and federal spending schemes and that New Jersey has expended no revenues from its Spill Fund on items covered by Superfund.

Stipulated facts before the Tax Court at the time of the original summary judgment motions in this case demonstrated that out of $33,000,000 spent from the Spill Fund since its inception, $31,000,000 was spent on the cleanup of chemical substances. Only $470,000 was spent on the cleanup of petroleum spills. Records produced subsequent to the Tax Court's decision indicate that during the period from January 1, 1981 through June, 1983, in excess of $18 million was expended by New Jersey from its Spill Fund on chemical site cleanups. Of this amount, more than $15 million dollars was spent on Superfund-covered sites on the National Priority List, none of which has been rejected for financing.[3] The same records indicate that approximately $1 million was spent on the State's matching share at Superfund sites. Therefore, less than two million dollars, or 11% of Spill Fund expenditures, was spent on sites not covered by Superfund. Conversely, almost 84% of Spill Fund expenditures was used at Superfund sites.[4] These expenditures directly contradict the State's own assertion that the preemption test it uses for Spill Fund expenditures is whether the site is on the National Priority List or, if included, rejected for financing. (N.J. Br. 20).

The position of the State has always been that it is not restricted in any way by § 114(c), in either taxing for or spending funds from the New Jersey Spill Fund. This position was set forth in the letter from the Director of Taxation in July, 1981, a copy of which was attached to plaintiffs' initial complaint, and has never been retracted.

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[3] This evidence was produced by New Jersey in response to requests for discovery in this suit and included in affidavits submitted by appellants in support of motions before the Tax Court.

[4] During this period, just under $89,000 was expended on petroleum spills.

CONCLUSION

The decision of the New Jersey Supreme Court below should be summarily reversed or, in the alternative, this Appeal should be accorded plenary review.

Respectfully submitted,

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Dated: February 11, 1985

No. 84-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Appellants,

VS.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' SUPPLEMENTAL BRIEF

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Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' SUPPLEMENTAL BRIEF

Appellants submit this Supplemental Brief pursuant to Rule 16.6 to respond to an intervening matter arising since their last filing—the interpretation of Section 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund"), 42 U.S.C. § 9614(c), as set forth in

the brief *amicus curiae* submitted by the Solicitor General of the United States.

Appellants concur with the Solicitor General's conclusion that probable jurisdiction should be noted and that the judgment of the Supreme Court of New Jersey should be reversed. (Br. 21). Appellants take issue, however, with the narrow scope of the remand recommended by the Solicitor General and the interpretation of Section 114(c) of Superfund that underlies this recommendation.

The Solicitor General concludes that of the five uses that can be made of money in the New Jersey Fund, only one is preempted by Section 114(c) of Superfund. (Br. 19-20). Specifically, the Solicitor General maintains that damages sustained and clean-up costs are preempted from payment from the New Jersey Fund if incurred by parties other than the State (Br. 20), but that expenditures from the New Jersey Fund for the same damages and costs by the State are not preempted. (Br. 12).[1]

The Solicitor General's brief focuses on the definitions of the terms "claim," "claimant" and "compensation." (Br. 11). First, "claim" is defined in Superfund as "a demand in writing for a sum certain," 42 U.S.C. § 9601(4), and "claimant" as "any person who presents a claim for compensation under this chapter," *id.*, at § 9601(5). The Solicitor General's brief, however, ignores the fact that the definition of "person" includes a "State," "commission" or "political subdivision of a state." *Id.* at § 9601(21).

Second, because compensation is not defined by Superfund, the Solicitor General resorts to a dictionary definition, which

[1]The Solicitor General also concludes that expenditures from the New Jersey Fund on research as to the effects of spills and improved clean-up operations, administrative and personnel costs and research on ocean pollution are not preempted. (Br. 20). Appellants agree. The record below indicates, however, that these three items have constituted less than six percent of the expenditures from the New Jersey Fund. (*See* Juris. St. 4). Moreover, expenditures on both areas of research are limited to the amount of interest credited to the New Jersey Fund. N.J.S. 58:10-23.11o(3) & (5).

defines "compensation" as "indemnification; *** making whole; giving an equivalent or substitute of equal value[;] [t]hat which is necessary to restore an injured party to his former position." (Br. 11). Based upon the above definitions, the Solicitor General concludes that the response costs of the State are not encompassed in "compensation for claims for any costs of response or damages . . ." as used in Section 114(c) because, where the State simply decides to spend New Jersey Fund money to remove or treat hazardous waste, there is no written demand for a sum certain" and the State is not indemnifying anyone or making anyone whole. (Br. 12).

I.

The Solicitor General's analysis of Superfund ignores the New Jersey Act's statutory framework and the relationship of the New Jersey Fund to the New Jersey Department of Environmental Protection (DEP) and is inconsistent with the terms of Superfund itself. The New Jersey Fund was established as a nonlapsing revolving fund in the Department of Treasury, which was to be credited with all taxes and penalties related to the New Jersey Act. N.J.S. 58:10-23.11i. Significantly, the purpose of the tax levied for the New Jersey Fund is "to insure *compensation* for cleanup costs and damages associated with any discharge of hazardous substances." *Id.* at 23.11h(a) (emphasis added).

An administrator appointed by the State Treasurer is the chief executive of the New Jersey Fund. N.J.S. 58:10-23.11j. The Fund is to be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages, no matter by whom sustained. N.J.S. 58:10-23.11g. When the DEP acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw upon money available in the Fund. N.J.S. 58:10-23.11f(a). However, under statutorily-defined circumstances the administrator of the New Jersey Fund must approve DEP's applications for payment, N.J.S. 58:10-23.11f(c), just as he would in paying any other claim made against the Fund. Moreover,

payment of any clean-up costs or damages by the New Jersey Fund is conditioned upon the administrator acquiring, by subrogation, all rights of the claimant to recover such costs or damages from the discharger or responsible party. N.J.S. 58:10-23.11q.

As discussed, "person" is defined in Superfund to include the State, a commission or political subdivision of a state. "Person" is similarly defined in the New Jersey Act to include "the State of New Jersey" and any of its political subdivisions or agents. N.J.S. 58:10-23.11b(o). Using the definition of "claim" and "claimant" as set forth in Superfund, therefore, the procedure whereby the New Jersey Fund pays the specific response costs of the DEP is without question "compensation" to "a person who has presented a demand in writing for a sum certain."

The Solicitor General's reliance on a dictionary definition of "compensation," in support of his argument that Section 114(c) preempts only claims by "third parties seeking to be made whole" (Br. 12), rests on the faulty premise that a state's claim for reimbursement of response costs is different from a third party claim for "compensation." In fact, under Superfund both types of claims seek relief in the nature of restitution. *Compare* the Solicitor General's dictionary definition of "compensation" with *United States* v. *Northeastern Pharmaceutical and Chemical Co.*, 19 Envir. Rep. Cas. [E.R.C.] 2186, 2188 (W.D. Mo. Sept. 30, 1983) (restitution has "the ultimate goal to return the plaintiff to his status quo); *id.* at 2188-89; *United States* v. *Reilly Tar & Chemical Corp.*, 20 E.R.C. 1052, 1056 (D. Minn. June 23, 1983); *United States* v. *Wade*, 20 E.R.C. 1853, 1855 (E.D. Pa. Feb. 21, 1984) (actions by the government to recover response costs under Superfund are equitable in nature, akin to restitution). Thus, reimbursement of state response costs is "compensation," just like reimbursement of third party claims.

Moreover, Section 111, 42 U.S.C. § 9611, which authorizes the assertion of state claims against the Superfund, and Section 112, 42 U.S.C. § 9612, which specifies the procedures governing claims against the Superfund, clearly treat reimbursement of state response costs and damages as satisfaction of a "claim" by the State. *See, e.g., State of New York* v. *General Electric Co.*, 592 F. Supp. 291, 299-301 (N.D.N.Y. 1984), where the court assumed that a state planning to apply for reimbursement from Superfund is subject to the claims procedures of Section 112. *See also United States* v. *Allied Chemical Corp.*, 587 F. Supp. 1205, 1207 (N.D. Cal. 1984).

The Solicitor General's refusal to recognize that a state agency seeking to recover its response costs from a state fund is seeking "compensation for claims" within the meaning of Section 114(c) not only is inconsistent with the meaning of those terms, but also conflicts with other provisions of Section 114(c) or closely related provisions of Superfund. Most importantly, the second sentence of Section 114(c) provides that "[n]othing in this section shall preclude any state from . . . imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for response to a release of hazardous substances which affects such State." If, as the Solicitor General suggests, the preemptive effect of Section 114(c) does not extend to payment of any government response costs, it would have made no sense for Congress to have granted states permission to impose a special tax solely to purchase the response equipment which they utilize in incurring response costs. Therefore, the exception to Section 114(c), which allows such a special tax for this limited purpose, proves that the New Jersey Fund may not be used to pay all state response costs in the manner envisioned by the Solicitor General.

A comparison of Section 114(b) with Section 114(c) of Superfund also reveals the Solicitor General's error. The former section provides that "any person who receives compensation for removal costs . . . pursuant to [Superfund] shall be precluded from recovering compensation for the same removal costs . . . pursuant to any other State or Federal law." The Solicitor General's argument that DEP's reimbursement from the New Jersey Fund does not constitute "compensation for

claims for any costs of response" within the meaning of Section 114(c) implies that DEP is not limited by Section 114(b)'s proscription against "any person . . . receiv[ing] compensation for removal costs" from both State funds and Superfund. But surely Congress contemplated that, if DEP received compensation from the New Jersey Fund for its response costs, it would be barred by Section 114(b) from being paid again by virtue of an application to Superfund. DEP must, therefore, be a "person who receives compensation for removal costs" within the meaning of Section 114(b), and thus should similarly be a "claimant" for "compensation" within the meaning of Section 114(c). 42 U.S.C. §§ 9614(b), (c).

Finally, the Solicitor General's attempt to limit the preemptive scope of Section 114(c) to third-party claims ignores the use of the word "damages" in that provision. The term "damages" is defined in Superfund, 42 U.S.C. § 9601(6), as "damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title." However, only the federal and state governments—not third parties—are entitled to assert claims against the Superfund for such damages and to bring actions in court for their recovery. 42 U.S.C. § § 9611(a), (b); 9607(a)(4)(C), (f). Assuming, as the Solicitor General does, that all the terms of Section 114(c) take their meaning from Superfund rather than state law, the reference in Section 114(c) to preemption of "damage" claims clearly contemplates preemption of state funds used to reimburse the state for natural resource damage claims. Thus, Section 114(c) cannot be limited to the preemption of payment of only third-party claims.[2]

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[2]The Solicitor General states that the parties' and lower courts' interpretation of Section 114(c) would result in redundancy. (Br. 10, 11). A more careful reading of this section discloses there is no redundancy in their interpretation and that, in fact, their construction of Section 114(c) parallels the permissible uses of Superfund money set forth in 42 U.S.C. § 9611. Compare 42 U.S.C. § 9614(c) (preemption) with *id.* § 9611 (permissible uses). The first use of the word "claims" in Section 114(c) refers to demands on the particular State fund, in this case the New Jersey Fund. The second use of the word "claims" refers to demands made on the Superfund.

II.

Far from supporting his position, the legislative history of Superfund undermines the Solicitor General's interpretation of Section 114(c). Contrary to his contentions (Br. 13), H.R. 85 did not deal exclusively with oil spills. H.R. 85, 96th Cong. 2d Sess. (1980). This bill was amended to create a fund for spills of hazardous wastes, other than petroleum, into navigable waters. *Id.* § 301. Contributions into state funds for the removal of both oil and other hazardous substances were preempted in § 110 and § 302, respectively. These sections of the bill provided that "no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a *compensable damage* under title V . . ." of the bill. *See id.* § § 110(a)(2), 302(a) (emphasis added). Title V, in turn, expressly defined "compensable damages" to include damages asserted for removal costs, *id.* § 531(a)(1), for which a State may assert a claim, *id.* § 103(a)(1), (b)(1); *id.* § 301(a)(1). The House Merchant Marine and Fisheries Committee Report, quoted at length by the Solicitor General (Br. 13-14), clearly provides that states may assert "claims" for removal costs under H.R. 85:

> "*A State can and is expected to be a claimant under the legislation.* In this manner, the costs of many of the oil pollution actions taken by a State will be compensable under a uniform, simple, and practicable system. Once a State expends money for removal costs, it may claim compensation for that item of damages under the procedures outlined in the bill."

H.R. Rep. No. 172, 96th Cong., 1st Sess. 23 (1979) (emphasis added), *reprinted in* 1 Library of Congress, Sen. Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of [Superfund], Public Law 96-510*, at 533 (Comm. Print 1983).

Since the definition of "compensable damages" in H.R. 85, cited in the Solicitor General's brief, included State claims for removal costs, the legislative debates on H.R. 85 further un-

dercut the Government's position that the preemption provisions of that bill "did not apply broadly to state payments or expenditures relating to oil spills. . . ." (Br. 13). *See, e.g.*, 126 Cong. Rec. 26196-26197 (1980) (remarks of Rep. Biaggi); *id.* at 26209 (remarks of Rep. Cleveland). *Accord id.* at 26207 (remarks of Rep. Roberts); *id.* at 26198 (remarks of Rep. Snyder).

Also, under the Administration's proposal, S. 1341, 96th Cong. 1st Sess. (1979), States could assert claims for removal costs of oil or hazardous substance spills, *id.* §§607(a)(1), (b)(1)(B). Thus, S. 1341's preemption provisior clearly applied to contributions to a State fund the purpose of which was to pay for State claims for removal costs relating to oil or hazardous substance spills. *Id.* § 612(a)(2).

Finally, S. 1480, 96th Cong., 1st Sess. (1979), as originally proposed applied only to discharges of hazardous substances. *Id.* § 4(a). It did not initially involve a feedstock tax and it expressly disclaimed a preemptive intent, *id.* § 8. Amendments were introduced to it by Senator Cannon on September 24, 1980. The written explanation for Amendment No. 2387 containing the preemption language was that it was to prevent States from establishing their own overlapping and duplicative systems and to make S. 1480 consistent with H.R. 85 and S. 1341. 126 Cong. Rec. 27086 (1980).

In sum, the legislative histories of Superfund's predecessor bills clearly indicate that the purpose of the preemption language in each of them was to prevent duplicate state funds for the purpose of paying claims provided for in the bills, all of which permitted state claims for costs. *See, e.g.*, 126 Cong. Rec. 27086 (1980) (written explanation of Cannon amendment); *id.* at 30949 (remarks of Sen. Randolph); *id.* at 26196-26197 (remarks of Rep. Biaggi); *id.* at 26197 (remarks of Rep. Florio); *id.* at 26202 (remarks of Rep. Livingston).[3]

[3]The colloquy between Senators Bradley and Randolph (Br. 17-18) is not inconsistent with appellants' reading of the statute. The thrust of that dialogue, as quoted and emphasized by the Solicitor General, is that there is no preemption with respect to state fund payments of expenses which do not constitute "compensible damages as defined in this legislation." The Senators could not have meant that Section 114(c) preempts only the payment of "damage" claims, when it also explicitly refers to "any costs of response" or other "claims which may be compensated" by Superfund. It is their focus on "compensibility" which is significant: Only "compensation for claims" is preempted by Section 114(c), as both Senators agreed, but such compensation can include that sought by State agencies, such as DEP.

CONCLUSION

The decision of the New Jersey Supreme Court should be summarily reversed and remanded with instructions that Section 114(c)'s preemption is not limited to the payment of claims made by third parties, but also includes the payment of claims made by DEP. In the alternative, this appeal should be accorded plenary review.

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ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasury of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

Appeal From the Supreme Court of New Jersey

JOINT APPENDIX

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Jurisdictional Statement Filed 12/17/84
Probable Jurisdiction Noted 6/17/85

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DOCKET ENTRIES

7/12/83—PB

SUPREME COURT OF NEW JERSEY

Docket #21,567 Cert #C-46-83 Appeal #A-78-83
Motion #M-108-83

Exxon Corporation, The BFGoodrich
Company, et al P-P/A

Farrell, Curtis, Carlin, & Davidson, Esqs.

v.

Robert Hunt, et al D-R

Attorney General

App Div Docket #A-3913-81T2

App Div Docket #A-3546-81T2

App Div Decision Date 6/22/83

Transcripts 9/9/83 Vol 1 Copies 3

S.Ct. Argument Date 1-23-84

7/12/83—Notice of Petition (+ Afft.)

7/12/83—Notice of Appeal (+ Afft.)

7/21/83—Pet for Cert and Appendix (+ Afft.)

7/21/83—App Div Briefs & Appx. & Reply Brief

8-12-83—Resp Brief (+ Afft.)

8-12-83—App Div Briefs

8-8-83—Pet. & Order permitting resp. brief to be filed on or before 8-12-83

8-24-83—Motion for extension of time to file Appellants brief, afft. in support—Farrell, Esq.

9-28-83—Order dismissing the motion for extension of time to file appellants brief as moot (M-108-83)

9-9-83—Order Grant Cert

7/12/83—$250.00 Farrell, Esq. Security Deposit

12-3-84—Affidavit of Costs

7/10/85—Taxed Costs

Fees App $20-, $20-

Decision Affirm

Decision Date 9-19-84 Vote 5-0

Opinion by Clifford, J. Pages 29

10-4-83—Corrected Order on motion for an extension of time to file the Appellants' brief is dismissed as moot (M-108)

12/2/83—Supplemental Letter—Farrell, Esq.

1/2/85—N/A to U.S. Supreme Ct

SUPREME COURT OF NEW JERSEY

Stephen W. Townsend
Clerk

Keith M. Endo
Deputy Clerk

Office of the Clerk
CN 970
Trenton, N.J. 08625

TO WHOM IT MAY CONCERN:

I, the undersigned, Clerk of the Supreme Court of New Jersey, do hereby certify that the attached is a true copy of the docket sheets in *Exxon Corporation, et al. v. Robert Hunt, et al.*, A-78 September Term 1982, Docket Number 21,567.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court at Trenton, this 29th day of July, 1985.

/s/ Stephen W. Townsend
Clerk

GUIDANCE

COOPERATIVE AGREEMENTS AND CONTRACTS WITH STATES UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510)

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF EMERGENCY AND REMEDIAL RESPONSE
MARCH 1982

EXECUTIVE SUMMARY

Based on authorities provided in Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and delegated in Executive Order 12316, the Environmental Protection Agency (EPA) is authorized to take remedial actions to clean up uncontrolled hazardous waste sites. In granting this authority, Congress also included provisions in the law requiring that Federal response actions be coordinated with State actions. Four provisions are of particular importance to Federal/State relations.

The first is the requirement that Federal remedial actions be undertaken only after consultation with the affected State or States. Agreements reached between the State and EPA are documented in a Cooperative Agreement or Superfund State Contract.

The second provision relates to assurances that the affected State must provide prior to any remedial action. The State must assure that it will:

- Assume operations and maintenance (O&M) responsibility for the site for all removal and remedial measures that are implemented.
- Provide for a facility for off-site disposal if necessary, and
- Share in the costs of the remedial action.

These assurances are included in the Cooperative Agreement or State Contract negotiated with the State.

The third and fourth provisions for coordinating State and Federal actions relate to the granting of a credit to an affected State for costs expended or obligated at a remedial action site between January 1, 1978 and December 11, 1980. The credit is used as part of the State's share of costs for a Federally funded response at the site.

The following additional guidance has been established by the Administrator to further define each of these provisions:

1. STATE CONTRACTS AND COOPERATIVE AGREEMENTS

CERCLA specifies that remedial actions (including any remedial planning activities) can be undertaken at a site only if a Cooperative Agreement or Superfund State Contract covering that action has been executed.* Both in-

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* CERCLA Section 104(b) authorizes the President to ". . . undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or approproate [sic] to plan and direct response actions . . ." CERCLA Section 104(c)(3) requires that ". . . The President shall not provide any remedial actions . . . unless the State in which the release occurs first enters into a contract or cooperative agreement with the President . . ."

struments are legally binding upon the State and EPA. The arrangement that is executed depends on whether EPA or the State assumes the lead responsibility for the remedial action:

- A Cooperative Agreement is required when the State has lead responsibility for the activity and funds are transferred to the State
- A Superfund State Contract is required when EPA has lead responsibility for the activity.

EPA will encourage States to assume lead responsibility for remedial actions in order to assist them in developing their own individual response capabilities:

Authority to bind EPA to the terms of a Cooperative Agreement or a Superfund State Contract has been delegated to the following EPA Officials.

- The Director, Grants Administration Division for Cooperative Agreements (the Award Official)
- The Assistant Administrator, Office of Solid Waste and Emergency Response for Superfund State Contracts (the Decision Official)

The signature of an authorized State official, certified by the State's Attorney General as having the authority to bind the State, also is required to execute the Cooperative Agreement or State Contract.

As action progresses at a site, a new or amended Cooperative Agreement or State Contract may be negotiated if necessary to incorporate any changes.

Cooperative Agreements and State Contracts will be site-specific and may cover one or more activities at that site.

2. STATE ASSURANCES

a) *O&M*

Prior to remedial investigation activity at a site, the State's Governor or Attorney General must sign a letter acknowledging State responsibility for operating and maintaining the action. The letter must be submitted as an attachment to the application for a Cooperative Agreement or State Contract.

Prior to remedial design activity, the State must make a firm commitment, either through a Cooperative Agreement or a new or amended State Contract, to assume O&M responsibility. To satisfy this requirement, the State must:

- Identify the organization unit responsible for administering O&M activities,
- Identify the State's financial mechanism for funding O&M activities, and
- Identify milestone dates for assuming responsibility.

In those cases where part or all of the selected remedy requires future O&M, EPA will share in those costs associated with ensuring that the remedy is functional and operational for a period not to exceed six months after completion of construction. Funds for this 6-month period must be specified before hand [sic] in a Cooperative Agreement.

b) *Off-Site Disposal*

Prior to remedial investigation activity at a site, the State must assure EPA in writing that it will provide an acceptable hazardous waste disposal facility, if one is needed to implement the remedial action selected. To be acceptable, the facility must:

- Have sufficient capacity to handle wastes from the site, and

° Be compatible with the type of wastes found on the site.

The written assurances shall be obtained beforehand from the State official who is authorized to enter into a Cooperative Agreement or State Contract.

c) *Cost-Sharing*

Prior to the commencement of any activitiy at a site, the State is required to acknowledge its responsibility to share in the cost of the action:

° At publicly owned sites, the State must share 50 percent of all response costs.

° At privately owned sites, States must share 10 percent of remedial planning (remedial investigation, feasibility study, and design) and remedial implementation.

This acknowledgement may be done either through a Cooperative Agreement or a new or amended State Contract. A State may authorize the reduction of its credit to cover its share of costs. If the State credit is not sufficient to satisfy the State's share of the costs:

° State funds will be used simultaneously with Federal funds for site expenses under a Cooperative Agreement.

° Payment terms will be negotiated and agreed to in a State Contract.

Prior to remedial design activity, the State must, either through a Cooperative Agreement or a new or amended State Contract, make a firm commitment to provide funding for remedial implementation. A State may satisfy this assurance by:

° Authorizing the reduction of a State credit to cover its share of costs, or

° Identifying currently available funds earmarked for remedial implementation, or

° Submitting a plan with milestones for obtaining necessary funds.

3. STATE CREDITS

State credits must be documented on a site-specific basis for State out-of-pocket, non-Federal eligible response costs between January 1, 1978 and December 11, 1980. Prior to remedial investigation activity at a site, the State must submit its estimate of these costs as a part of the pre-application package when a Cooperative Agreement is used, or as a part of the State Contract.

State credits will be applied against State cost shares for Federally funded remedial actions. A State cannot be reimbursed from the Fund for credit in excess of its matching share.

4. STATE COST-SHARE CONTRIBUTION

Terms for obtaining State cost shares for remedial activities will be identified in the Cooperative Agreement or State Contract covering those activities. Where a credit has been identified at a site, EPA will reduce that credit by an amount equal to the State's share of costs until the credit is eliminated or the remedial action is complete.

For EPA-led remedial actions where there is no State credit or the credit is not sufficient to cover State costs, payment terms will be negotiated between EPA and the State and documented in the State Contract. The terms agreed to should accommodate individual State needs, within these constraints:

° States should provide some up-front funds for each planing activity (remedial investigation, feasibility study, remedial design) before that activity starts.

- Other payments may be scheduled during or immediately following each planning activity.
- Prior to implementing the chosen remedial action, EPA will require full payment of the State's share of remedial planning.

For State-led remedial actions where there is no State credit or the credit is not sufficient to cover State costs, the Cooperative Agreement will cover only EPA's share of costs. EPA will provide the award amount to the State through a letter of credit. States are required to match Federal funds as work progresses. Drawdowns will be monitored to ensure that States provide their cost shares as Federal funds are used.

5. PRE-EMPTION

Section 114(c) of CERCLA prohibits a State from requiring persons to contribute to funds for the purpose of certain activities related to hazardous substance response. EPA has reviewed the type of hazardous response activities covered by this section and has determined that it does not apply to State funds which are used for the following purposes:

- To finance the administrative costs of a State fund,
- To finance the purchase or prepositioning of hazardous substance response equipment and other preparations for responding to releases within a State,
- To finance the cleanup of petroleum discharges,
- To pay the required State contribution to cleanup actions financed by the CERCLA Trust Fund,
- To compensate claims for the cost of restoration and replacement of any natural resources damaged or destroyed by a release of a hazardous substance,

- To advance funds to remove or remedy releases of hazardous substances eligible to be financed by the Hazardous Substance Response Fund if a Cooperative Agreement or Contract has been issued by the Environmental Protection Agency.
- To compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by the Fund but for which no federal reimbursement is provided.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-3913-81T1

Exxon Corporation, The BF Goodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.,

Plaintiffs-Appellants,

vs.

Robert Hunt, Administrator of N.J. Spill Compensation Fund; Clifford A. Goldman, Treasurer of the State of N.J.; Sidney Glaser, Director of the Division of Taxation; and the State of N.J.,

Defendants-Respondents.

and

Exxon Corporation, The BF Goodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.,

Plaintiffs-Appellants,

vs.

Robert Hunt, Administrator of N.J. Spill Compensation Fund; Clifford A. Goldman, Treasurer of the State of N.J.; Sidney Glaser, Director of the Division of Taxation; Jerry F. English, Commissioner of Environmental Protection; and the State of N.J.,

Defendants-Respondents.

CONSOLIDATED CIVIL ACTIONS—ON APPEAL FROM FINAL DECISION OF THE TAX COURT OF NEW JERSEY
SAT BELOW: HON. JOHN F. EVERS, J.T.C.

Docket No. A-3546-81T2

Exxon Corporation, the BF Goodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.,

Appellants,

vs.

Kenneth R. Biederman, Treasurer of the State of N.J. and the N.J. Department of the Treasury,

Respondents.

CIVIL ACTION—ON APPEAL FROM PROMULGATION OF REGULATIONS BY THE TREASURER OF THE STATE OF NEW JERSEY

APPENDIX ON BEHALF OF PLAINTIFFS-APPELLANTS

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JOHN J. CARLIN, JR.
LISA J. POLLAK
On the Brief

STATE OF NEW JERSEY

DEPARTMENT OF LAW AND PUBLIC SAFETY

DIVISION OF LAW
FINANCIAL SECTION
107 West State Street
CN 112
Trenton 08625
Telephone 609/292-1526

November 17, 1981

John J. Carlin, Jr., Esq.
Farrell, Curtis, Carlin & Davidson
43 Maple Ave.
P. O. Box 145
Morristown, NJ 07960

Re: EXXON Corp. v. Hunt

Dear Mr. Carlin:

This letter is to confirm the figures supplied to you today by telephone. As I noted to you, these figures are estimated and subject to verification and are being furnished at your request so as to obviate the need, at the present time, to take the depositions of the various State officials you have previously noted. We will continue to work on answers to your questions and will respond to you as soon as the results are obtained.

Information furnished by the Office of the Administrator of the Spill Compensation Fund:

Period 7/1/80 to 6/30/81

Clean-up Expenditures	
Hazardous Substances	$27,000,000
Petroleum	$ 370,000

Damage Claim Expenditures	
Hazardous Substances	$ 354,000
Petroleum	$ 124,000

Information supplied by the Division of Taxation:

Fiscal Year	*Amount of Tax Revenue*
1977	$ 1,100,415
1978	6,429,830
1979	6,402,848
1980	6,850,324
1981	12,788,846

At the present time, there are 262 taxpayers registered under the Spill Compensation and Control Act.

I am enclosing copies of the three schedules prepared by the Administrator of the Spill Compensation Fund.

Very truly yours,

JAMES R. ZAZZALI
Attorney General of New Jersey

By: /s/HERBERT K. GLICKMAN
Herbert K. Glickman
Deputy Attorney General

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encl.

NEW JERSEY SPILL COMPENSATION FUND

SCHEDULE OF REVENUES AND DISBURSEMENTS

JULY 1, 1979 TO JUNE 30, 1980

FUND BALANCE JUNE 30, 1980

Fund Balance 6/30/79			$11,823,040.37
REVENUES			
Tax Deposits	$6,849,636.73		
Penalties & Interest	13,161.63		
Interest Transferred—Cash Management Fund	1,826,496.38	$8,689,294.74	
Total Available			20,512,335.11
EXPENDITURES			
Clean-up	2,612,390.49		
Transferred to Treasury Administration	(15,865.68)	2,596,524.81	
Treasury Administration	55,860.26		
Transferred from Clean-up	(15,865.68)		
Damage Claims	63,516.44		
DEP Administration	659,129.82		
DEP—Research	131,399.60	909,906.12	

LIABILITIES			
Clean-up Obligations	2,130,978.82		
Administration Obligations—Treasury	100,000.00	2,230,978.82	
Total Expenditures & Liabilities			5,753,275.43
Fund Balance June 30, 1980			$14,759,059.68

NEW JERSEY SPILL COMPENSATION FUND
STATEMENT OF ACCOUNT

Fund Balance as of June 30, 1980		$14,759,059.68
Outstanding Violations		34,800.00
		14,793,859.68
Liabilities		
Damage Claim Reserves 6/30/80		
Chemical Control	$1,000,000.00	
Other Claims	300,000.00	
Clean-up Expenses Reserves:		
Chemical Control Corporation	10,000,000.00	
Pre-Act Discharges	1,500,000.00	12,800,000.00
Balance		$1,959,059.68

The cost of cleanup of the discharge of hazardous material continues to dominate expenditures from the Fund. During the fiscal year 7/1/79-6/30/80, the total cost for cleanup and removal of current discharges amounted to $2,422,152.62 of which $2,395,806.69 represents the cleanup and removal of hazardous materials other than petroleum. Furthermore, amendatory legislation was signed into law in January 1980 which gives the Administrator authority, subject to availability of funds, to approve the cost of cleanup and removal of conditions which may not constitute a discharge but create an imminent peril to the safety and welfare of the public. The amended legislation also permits the Administrator, subject to availability of funds, to approve annual expenditures not to exceed $3 million for the cleanup and removal of discharges which commenced prior to the inception of the Act. The New Jersey Department of Environmental Protection is actively working to identify and establish priorities on this subject, which is composed largely of abandoned sites of hazardous materials and it is expected that the full $3 million annual allotment will be utilized.

The previously reported legal desision in the Bergen County Superior Court litigation of State of New Jersey, Department of Environmental Protection vs. Ventron Corporation is under appeal. Since amendments to the law provide a limitation of $1.5 million per site for pre-Act discharges, the impact of any decision against the Fund may conform to the new statutory limit. However, the possibility remains of an adverse interpretation which would expose the resources of the Fund to unlimited liability.

On April 21, 1980, a major discharge of hazardous material occurred when an explosion and fire erupted at the site of the Chemical Control Corporation in Elizabeth, New Jersey. The results of this occurrence created an imminent peril to the safety and welfare of the residents of the

City of Elizabeth and the environment which required immediate action by the New Jersey Department of Environmental Protection to accelerate cleanup and removal operations which were already in process. As of June 30, 1980, it is estimated that the total cost of cleanup to be completed by November 1, 1980 will approach $12 million. Additional obligations of approximately $1 million can be anticipated for the payment of damage claims presented by third parties. The cost of this cleanup will dramatically reduce the balance in the Fund which could create an availability problem in the cleanup of future discharges.

Efforts to recover funds against responsible dischargers are continuing with legal actions being prepared and pursued by deputies in the Attorney General's office representing the Fund. Many legal issues have been raised by alleged dischargers which have impeded reimbursement to the Fund and will result in extended legal activity.

NEW JERSEY SPILL COMPENSATION FUND
CLEAN-UP EXPENSE SUMMARY
7/1/79-6/30/80

PAID		
Petroleum Spills		$ 26,345.93
Chemical Spills		2,395,806.69
Pre-Act Discharges		174,372.19
RESERVES		
Cleanup in Progress		
Chemical Control	10,000,000.00	
Pre-Act Discharges	1,500,000.00	
TOTAL		$14,096,524.81

NEW JERSEY SPILL COMPENSATION FUND

CLEAN-UP EXPENSE

7/1/79-6/30/80

PETROLEUM SPILLS

NO.	*SPILL*	*AMOUNT*
1. 798-02 Burlington County	#2 oil, unknown source	$ 5,565.73
2. 798-06 Allamuchy	deliberate dump-kerosene & other oils	5,281.24
3. 798-07 Allamuchy	deliberate dump-kerosene & other oils	532.08
4. 778-02 Perth Amboy	illegal dump of transformer oil	2,790.53
5. 798-11 Harding Twp.	#2 oil at truck rest area, source unknown	4,863.06
6. 798-18 Willingboro (Edgewater Park)	oil spill, source unknown	7,313.26
	TOTAL:	$26,345.93

NEW JERSEY SPILL COMPENSATION FUND

CLEAN-UP EXPENSE

7/1/79-6/30/80

CHEMICAL SPILLS

NO.	*SPILL*	*AMOUNT*
1. 789-08 Jersey City (United Chemical	fire in chemical warehouse, massive discharge of hazardous substances; fire originated at adjacent location	$ 126,632.39
2. 789-13 Newark (Arlington Warehouse)	fire in chemical warehouse, discharge of hazardous substances	75,365.46
3. 798-09 Jackson Township	alleged illegal dumping of hazardous materials	4,525.90
4. 798-12 Hillsborough Twp.	hazardous materials discharge from tanks and drums	48,285.81
5. 798-14 Sayreville	leaking drums of hazardous materials	50,586.36
6. 798-15 Cape May	leaking drums of hazardous materials; contaminated soil	7,097.80
7. 798-16 Elizabeth (Flora St.)	cleanup & removal of drums of chemical waste	25,960.73
8. 798-17 Jersey City	alleged illegal dumping of hazardous materials	138,688.53
9. 789-17 Elizabeth (Chemical Control)	leaking drums of waste chemicals; court order issued to clean-up; explosion and fire	1,918,663.71
	TOTAL:	$2,395,806.69

NEW JERSEY SPILL COMPENSATION FUND

CLEAN-UP EXPENSE

7/1/79-6/30/80

PRE-ACT DISCHARGES

NO.	*SPILL*	*AMOUNT*
1. 80-10 Altman Avenue Rutherford	Small number of drums of hazardous material dumped along roadside	$ 2,173.00
2. 80-07 Sayreville (Atlantic Development)	Abandoned factory with 1,000 drums & 500 5-gallon pails of hazardous waste, soil contamination	1,692.00
3. 80-16 New Brunswick (A-Z Chemical)	Abandoned site with 10,000 drums of various hazardous wastes; limited soil & groundwater contamination	84,256.15
4. 80-02 Piscataway (Bubenick)	40 leaking drums of assorted solvents and adhesives; 5 cubic yards of contaminated soil	13,505.03
5. 80-05 Newark (Thos. Cook)	Abandoned building with 7,000 gallons of formaldehyde in open vats; several drums of various other hazardous materials	10,744.49
6. 80-15 Howell Twp. (El Cid)	Abandoned trailer containing 84 leaking drums of hazardous material	11,817.20
7. 80-11 East Rutherford (Madison Circle)	Approximately 65 drums containing hazardous wastes dumped along roadside	16,070.65
8. 80-04 Hillsborough Twp. (Swoco)	Tanks containing 24,000 gallons of waste oil and sludges	34,113.67
	TOTAL:	$174,372.19

ADDENDUM

Since this report is being prepared in December 1980, a copy of notification from the Administrator dated October 24, 1980, is attached which more clearly represents the current status of the Fund balance in comparison to the June 30, 1980 report.

MEMORANDUM

Hon. Clifford Goldman
State Treasurer
and

To Sidney Glaser, Director
Division of Taxation
Department of Treasury

From Robert E. Hunt, Administrator
N.J. Spill Compensation Fund

Subject Spill Compensation Fund

Date October 24, 1980

Pursuant to the provisions of the New Jersey Spill Compensation and Control Act P.L.1976,c.141, I am notifying you that the total cost of reasonable claims against the New Jersey Spill Compensation Fund exceeds the Fund balance as recorded on October 17, 1980.

Under the provisions of C 58:10-23.11h, Section 9, the calculation of the cost of reasonable claims against the Fund requires a tax increase on hazardous substances to $0.04 per barrel transferred or 0.8% of the fair market value of such hazardous substance, until the revenue produced by such increased rate equals 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of hazardous substances other than petroleum or petroleum products. It will not be necessary to increase the tax on petroleum or petroleum products since the existing rate of $0.01 per barrel transferred will produce sufficient revenue to satisfy outstanding reasonable claims against the Fund within one year.

The cost of reasonable claims against the Fund as the result of discharge of hazardous substances other than

petroleum which creates the deficit balance is $3,258,296. Therefore, the increased tax should remain in effect until it produces revenues on hazardous substances equal to $4,887,444.

R.E.H.

R.E.H.:rj

N.J. SPILL COMPENSATION FUND

Fund Balance 10/17/80		$6,308,927.
Control Balance	$2,258,492.	
Interest	2,700,000.	
Cleanup Balance	1,350,435.	
Outstanding Expenses		
Unpaid invoices at DEP	1,814,000.	
Unpaid invoices at Spill Fund	510,795.	
Unpaid invoices for Pre-Act at Spill Fund	90,198.	
Cleanup obligation (A to Z)	65,000.	$2,479,993.
Commitments Against Appropriations		
Administration Spill Fund	100,000.	
Dept. of Environmental Protection	500,000.	
Obligation for Adjustment Services (Chemical Control)	100,000.	700,000.
Pending Damage Claims		1,021,788.[1]
Expenses for Cleanup and Removal of Current Discharges		
Chemical Control	2,500,000.	
Sampson Tank (Ringwood & West Milford)	3,000,000.	5,500,000.[2]

Total costs of reasonable claims against the Fund	$9,701,781.
Operating Fund Balance 10/17/80	(3,392,854)

NOTE:

1. 134,558. represents discharge of petroleum.
2. Of the $5.5 million, $2 million represents services already performed but not billed.

NEW JERSEY SPILL COMPENSATION FUND

SCHEDULE OF REVENUES AND DISBURSEMENTS

FOR 1977, 1978 AND 1979

FUND BALANCE JUNE 30, 1979

Revenues			
Interest on Investments	$ 634,471.41		
Less Accrued Interest Paid	(4,031.87)	$ 630,439.54	
Interest Due from State of New Jersey Cash Management Fund		536,172.06	
Profit & Loss		2,569.58	$ 1,169,181.18
Division of Taxation Deposits	$13,921,663.86		
Less Refunds	(23,220.60)	$13,898,443.26	
Penalty and Interest		81,844.84	$13,980,288.10
Appropriated Receipts (*See below)			1,267.50
TOTAL REVENUES			$15,150,736.78
Disbursements			
Hazardous Substance Removal Costs		$ 1,900,609.97	
Cleanup and Restoration Costs		1,361.61	

Administrative Costs			
Treasury	$ 99,580.48		
Oil Spill–DEP	657,135.50		
Oil Spill–DEP Pollution Control	200,000.00	$ 956,715.98	
Liabilities			
Obligations of Appropriations	$ 467,741.35		
Due to Emergency Service Trust (*See above)	1,267.50	$ 469,008.85	
TOTAL DISBURSEMENTS & LIABILITIES			$ 3,327,696.41
Fund Balance as of June 30, 1979			$11,823,040.37

N.J. SPILL COMPENSATION FUND

STATEMENT OF ACCOUNT

Fund Balance as of June 30, 1979		$11,823,040.37
Outstanding Violations		34,975.00
		11,858,015.37
Reserves on Active Claims		
Damage Claims	$ 255,667.00	
Cleanup Expense:		
Chemical Control	2,488,061.48	
United Chemical	126,632.39	
Arlington Warehouse	75,365.46	2,945,726.33
Balance		$ 8,912,289.04*

* If an appellant decision in the Ventron litigation upholds a trial court interpretation declaring the Fund responsible for pre-Act discharges (see narrative), additional damage claim reserves of $13.5 million will result, producing a deficit balance of $4,587,-710.96.

N.J. SPILL COMPENSATION FUND

ANNUAL REPORT

The Fund was used for the cleanup of (19) spills during the period 7/1/78-6/30/79. This included three major spills still in progress; two involving fires at chemical warehouses in Jersey City, N.J. and Newark, N.J., and an extensive cleanup of leaking waste chemical drums at the site of Chemical Control Corporation, Elizabeth, N.J. The total expense for cleanup, including reserves for work in progress will be $4,527,095.26.

As of 6/30/79, 23 damage claims have been received. Three have been denied as not eligible for recovery and three have been paid directly by the discharger with the assistance of the Fund. Fifteen claims remain pending, six of which have been denied because they involved pre-Act discharge. The Bergen County Superior Court recently issued a decision in the case of State of New Jersey, Department of Environmental Protection vs. Ventron Corporation, which appears to hold the Fund responsible for pre-Act discharges. The full impact of this decision cannot be evaluated until the Order for Judgment is filed. It is expected most of the parties to the litigation will file an appeal. If it is concluded that the Fund will be responsible for pre-Act discharges, a reconsideration of the six known damage claims including Ventron (presently valued at $9 million) will result in added reserves of $13.5 million.

Public awareness of the Fund continues to increase and more time is being devoted to the evaluation and consideration of damage claims. Legal activity is also increasing as we begin subrogation actions to recover funds expended.

N.J. SPILL COMPENSATION FUND

CLEAN-UP EXPENSE

7/1/78-6/30/79

Petroleum Spills Total	$ 40,651.55
Chemical Spills Complete	$1,796,384.38
Chemical Spills–Reserves Cleanup in Progress	$2,690,059.33
TOTAL	$4,527,095.26

N.J. SPILL COMPENSATION FUND

CLEAN-UP EXPENSE

7/1/78-6/30/79

PETROLEUM SPILLS

NO.	*SPILL*	*AMOUNT*
1. 778-02 Perth Amboy	illegal dump of transformer oil	$25,984.09
2. 789-02 Wayne	underground fuel oil storage tank leak	2,631.25
3. 789-03 Netcong	underground fuel oil storage tank leak	726.35
4. 789-07 White House Station	gasoline-leaking underground storage tank	1,278.00
5. 789-10 Denville	gasoline-leaking valve at pump at gas station	3,374.38
6. 789-15 Hillsboro Twp.	gasoline or aviation fuel, source unidentified	718.40
7. 789-18 Atlantic City	#2 fuel oil–oil storage tank leak	2,643.44
8. 789-22 Carneys Point	intentional dump of oil	3,295.64
	TOTAL:	$40,651.55

N.J. SPILL COMPENSATION FUND

CLEAN-UP EXPENSE

7/1/78-6/30/79

CHEMICAL SPILLS

NO.	*SPILL*	*AMOUNT*
1. 789-01 Hammonton	illegal abandonment of leaking drums of hazardous materials	$ 49,761.93
2. 789-04 Freehold	illegal abandonment of leaking drums of miscellaneous chemicals	390.00
3. 789-05 Hammonton	illegal chemical dump	195.00
4. 789-06 Elizabeth	accidental spill of waste chemicals	273.53
5. 789-08 Jersey City (United Chemical)	fire in chemical warehouse, massive discharge of hazardous substances; fire originated at adjacent location	547,070.69
6. 789-11 Elizabeth	accidental spill of waste chemicals	193.51
7. 789-12 New Shrewsbury	illegally abandoned drums of leaking hazardous chemicals	4,958.14
8. 789-13 Newark (Arlington Warehouse)	fire in chemical warehouse, discharge of hazardous substances	1,159,530.08

9. 789-14 Teaneck	lithium battery waste contaminated soil due to fire in disposal vehicle	16,756.20
10. 789-17 Elizabeth (Chemical Control Corp.)	leaking drums of waste chemicals; court order issued to clean up	11,938.52
11. 789-20 Elmwood Park	deliberate dump of zinc chloride	5,316.78
	TOTAL:	$1,796,384.38

ADMINISTRATOR'S ANNUAL REPORT

New Jersey Spill Compensation Fund

STATEMENT OF CASH RECEIPTS & DISBURSEMENTS

For 15 Month Period 4/1/77 - 6/30/78

Receipts		
Taxes Collected	$7,495,625.83	
Penalties for Violations ...	34,619.00	
Interest on Investments ...	207,628.66	
Total Receipts		$7,737,873.49
Disbursements		
Salaries	$ 8,125.00	
Administrative Services ...	866.68	
Clean-up Expense	63,574.04	
Division of Taxation	20,960.00	
DEP Pollution Control Expense ..... (S 734 signed 6/30/78)	200,000.00	
Contingent Liability (Administration)	291,716.69	
Total Disbursements		$ 585,242.41
Balance 6/30/78		$7,152,631.08

New Jersey Spill Compensation Fund

Potential Liability for Damages as of 6/30/78

Fund Balance 6/30/78	$7,152,631.08
Outstanding Violations .	$ 30,570.00
Pending Claims (8)	($7,588,696.34)*
Total (Potential Deficit)	($ 405,495.76)*

The potential liabilities against the Fund are recorded at face value and include the Ventron Corp. case (see below) at a value of $6,000,000. Any payment of claims, as required by legislation, will be subject to a claims adjustment evaluation and the Fund will acquire subrogation rights to proceed for reimbursement against dischargers if the discharger can be identified.

Since April 1, 1977, there have been ten (10) damage claims filed against the Fund. Two (2) have been resolved without payments from the Spill Compensation Fund. Of the eight (8) claims pending, six (6) relate to discharges which commenced prior to 4/1/77.

The legal issue of whether the Spill Compensation and Control Act provides for retroactive clean-up and damage payments is the subject of litigation in *State of New Jersey, Department of Environmental Protection vs Ventron Corp.*, Docket No. C-2996-75, Superior Court Chancery Division, Bergen County. This case raises the question of whether the Fund is strictly liable for clean-up, removal and abatement expenses related to alleged mercury pollution of a 40 acre tract of land in Carlstadt, New Jersey, which occurred prior to April 1, 1977. The expense of such corrective procedures has been estimated at approximately $5-6 million. To protect the financial viability of the Fund and assure the administration of the Fund in conformity with the requirements of the Spill Compensation and Control Act,

the Administrator has formally taken the position through counsel in the *Ventron* case that the Fund is responsible only for discharges of hazardous substances occurring *after* the effective date of the Act.

Public awareness of the Fund has been increasing. In addition to a high frequency of telephone inquiries, there have been seventeen (17) requests for claim forms which have been sent out.

In general, known dischargers are responding directly to damage claims. Because of the Fund, damage claims by individuals and municipalities can be processed at less cost to the public by soliciting the assistance of the Administrator who has been able to invoke the provisions of the Act to encourage settlements by known dischargers without requiring court action.

ROBERT E. HUNT
ADMINISTRATOR

/s/ ROBERT E. HUNT

No. 84-978

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Appellants,

VS.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasury of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

Appeal From the Supreme Court of New Jersey

BRIEF OF APPELLANTS

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QUESTION PRESENTED

When Congress established a federal Superfund financed by a tax on oil and chemicals, it expressly preempted States from requiring contributions to funds the "purpose" of which is to pay cleanup costs and damages which "may be compensated" under Superfund. New Jersey requires operators of major oil and chemical facilities to contribute to a Spill Fund the principal purpose of which is the payment of cleanup costs and damages at sites which are eligible for compensation from the federal Superfund. The question thus presented is:

Whether the New Jersey Spill Fund is preempted because its purpose is to pay cleanup costs and damages which are eligible for payment from and thus "may be compensated" under Superfund or whether, as New Jersey contends and its Supreme Court held, federal preemption only precludes disbursements by Spill Fund for such cleanup costs as "are actually paid" by Superfund?*

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*The names of all parties are set forth in the caption of the case. The appendix to the Jurisdictional Statement, pp. 1a-14a, lists all parent companies, subsidiaries (except wholly owned) and affiliates as required by Rule 28.1.

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IN THE

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Appellees.

Appeal from the Supreme Court of New Jersey

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinions of the lower courts are:

Supreme Court of New Jersey, 97 N.J. 526, 481 A.2d 271, reprinted in the appendix to the jurisdictional statement (J.S.) at 15a-36a;

Appellate Division of the Superior Court of New Jersey, 190 N.J. Super. 131, J.S. 37a-46a; and

Tax Court of New Jersey, 4 N.J. Tax 294, J.S. 47a-78a.

JURISDICTION

On September 19, 1984, the Supreme Court of New Jersey entered a judgment affirming the New Jersey Superior Court, Appellate Division, which in turn had affirmed the summary judgment of the New Jersey Tax Court entered against appellants. On November 19, 1984, a timely notice of appeal to this Court was filed by appellants in the New Jersey Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

This Court noted probable jurisdiction on June 17, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2, provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.

Pertinent parts of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (CERCLA), are set out in full in the appendix to the jurisdictional statement (J.S. 96a-167a). Sections 114(b) and (c) of CERCLA, 42 U.S.C. §§ 9614(b) & (c), provide as follows:

> (b) Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall

> be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.
>
> (c) Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

Relevant parts of the New Jersey Spill Compensation and Control Act, NJS 58:10-23.11 *et seq.* (Spill Fund), are set out in the appendix to the jurisdictional statement (J.S. 83a-95a). Sections 58:10-23.11f, h and z of that statute provide in pertinent part as follows:

> f. Removal of hazardous substances and actions to minimize damage from discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan for removal of oil and hazardous substances established pursuant to section 311(c)(2) of the Federal Water Pollution Act Amendments of 1972 (P.L. 92-500, 33 U.S.C. 1251 et seq.).
>
> h. There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee; . . .

z. If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendations to the Legislature for amendments to this act.

STATEMENT OF THE CASE

There has in recent years developed an increasing awareness of and concern with the potential damage to the environment caused by the release of hazardous substances. In 1972, through passage of one part of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (Clean Water Act), Congress first addressed this problem. That act, however, dealt only with discharges into navigable waters. In 1976, Congress enacted the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA), to regulate the future handling of hazardous wastes on land. RCRA did not deal with non-waste toxic materials, nor did it provide for the cleanup of existing hazardous waste sites.

Thus, neither the Clean Water Act nor RCRA was designed to be a comprehensive federal response to the hazardous waste problem. Moreover, by the late 1970's a few States had adopted statutes imposing potentially conflicting obligations upon companies operating in interstate commerce.

New Jersey was one of those States. In 1977, its Spill Fund Act was passed. As more fully described below, pp. 22-24, that Act established a State-administered fund supported by a tax levied upon operators of major facilities in New Jersey used to produce or store petroleum or chemical products. The stated purpose of this fund is to finance hazardous waste cleanup and pay related damages. The New Jersey Act explicitly requires the State, in pursuing such cleanup, to act in accordance with the "National Contingency Plan" as established under the Clean Water Act.

A number of bills were introduced in the 96th Congress that recognized that existing federal programs did not comprehensively deal with the cleanup of hazardous substances and that pointed to the dangers posed by the emerging patchwork of variant State statutory approaches to this problem. Ultimately, on December 11, 1980, as one of the last acts of the 96th Congress, CERCLA was enacted as a compromise measure drawing elements from these predecessor bills.

CERCLA established a $1.6 billion "Superfund," 86% of which is financed by a tax on oil and certain chemicals. The principal purpose of Superfund is to pay for hazardous waste cleanup and related damages to natural resources held in trust by the federal or State governments. CERCLA also directed that the National Contingency Plan established under the Clean Water Act be revised to provide procedures and establish priorities for responding to the release of hazardous substances. CERCLA provides that State cleanup expenditures, if undertaken in a manner consistent with the revised National Contingency Plan, are compensable by Superfund.

A key provision of CERCLA—and the one that gives rise to this suit—is Section 114(c). It preempts States from maintaining special funds for the "purpose" of paying compensation for hazardous substance cleanup costs, damages or claims which "may be compensated" under CERCLA.

Proceedings Below

Soon after CERCLA was enacted, appellants filed a complaint in the United States District Court for the District of New Jersey contending that Spill Fund was preempted by Section 114(c). That court dismissed appellants' suit on the basis of the Tax Injunction Act, 28 U.S.C. § 1341. The Third Circuit affirmed, albeit on the additional ground that plaintiffs' claim did not "arise under" federal law. *Exxon Corp.* v. *Hunt*, 683 F.2d 69 (3d Cir. 1982). This Court denied certiorari. 459 U.S. 1104 (1983).

After dismissal in the district court, appellants filed a complaint in the New Jersey Tax Court. On cross motions for summary judgment, that court dismissed the counts of appellants' complaint which alleged that Spill Fund was preempted. Although recognizing that the purpose of Spill Fund is to finance cleanup costs and damages which "may be compensated" under CERCLA in the sense that they are eligible for compensation under the statute, the Tax Court ruled that Section 114(c) only precludes the use of State funds to pay for cleanup and damages which are actually compensated under CERCLA.

The decision of the Tax Court was appealed to the Appellate Division of the Superior Court. On June 22, 1983, that court affirmed the judgment of the Tax Court. Subsequently, on September 19, 1984, the Supreme Court of New Jersey affirmed the judgments of the Tax Court and the Appellate Division. The State Supreme Court concluded that

> "[t]he Spill Fund tax imposed on plaintiffs is not preempted by Section 114(c) of [CERCLA] insofar as Spill Fund is used to compensate hazardous-waste cleanup costs and related claims that are *either not covered or not actually paid* under [CERCLA]. The underlying intent of [CERCLA], as well as the legislative history, mandates a conclusion of *no preemption*." J.S. 36a (emphasis added).

During the pendency of this litigation, appellants have continued to pay taxes under protest into the New Jersey Spill Fund. The total of their payments between CERCLA's enactment and year-end 1984 exceeds $9,000,000.

SUMMARY OF ARGUMENT

When Congress adopted CERCLA as a "comprehensive" federal-State program designed to clean up hazardous waste through a federal Superfund, it expressly preempted State funds not drawn from general revenues whose purpose was to pay claims which may be compensated under Superfund. The

principal purpose of the New Jersey Spill Fund is to pay such claims.

Accordingly, this is an express preemption case. Under the principles recently articulated in *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983), a court's function in such a case is to analyze the statute as Congress has written it. Consciously ignoring *Aloha*, the New Jersey Supreme Court instead "harmonize[d]" CERCLA and the New Jersey Spill Fund in accordance with its own assessment of State and federal interests and thereby left the State law intact.

The New Jersey Supreme Court first erred in focusing its inquiry on the uses to which the New Jersey Spill Fund had been or might be put rather than the purpose of the exaction, as required by Section 114(c). It then transmuted the phrase "may be compensated," which broadly establishes the scope of preemption under Section 114(c), into the wholly different phrase "are actually paid." In this fashion, it made Section 114(c) a mere reiteration of the prohibition of duplicative compensation contained in Section 114(b) and rendered meaningless the provisos to Section 114(c) regarding permitted uses of general revenues and special-fund financing of response equipment.

Preemption of the New Jersey Spill Fund is not only expressly required, but also it effectively implements the intention of Congress as reflected in CERCLA and in its legislative history. CERCLA was the first "comprehensive" response by Congress to the national problem of cleaning up hazardous waste sites and spills. All of the bills which preceded its enactment contemplated some type of "Superfund" derived from a tax on oil and chemicals. Congress directed the federal government, in close cooperation with the States, to develop procedures and priorities for the expenditures of these Superfund monies. At the same time, it provided for federal-State coordination with respect to expenditures to clean up priority sites.

Section 114(c) protects this statutory scheme. To preserve the figure which it selected as the appropriate tax to impose on

oil and chemicals to create a cleanup fund during the first five years of CERCLA, Congress preempted all special State funds whose purpose was to clean up Superfund-eligible sites; inevitably, like New Jersey's existing fund, such funds would be raised by taxes on the same products which financed Superfund. Moreover, the whole program of federal-State priorities for Superfund expenditures and oversight of cleanup operations at Superfund-eligible sites could have been disrupted by States' pursuit of their own cleanup priorities undertaken through procedures not coordinated with the federal government and financed by their own special funds.

A construction of Section 114(c) as preempting special State funds whose purpose is to finance any cleanup costs and damages that are eligible for CERCLA compensation is therefore essential, even though there may be potential costs which are eligible for compensation under CERCLA but will not actually be compensated. It was precisely because Congress recognized that not every cleanup cost or damage claim could or should be compensated by funds drawn from special taxes on oil and chemicals during the first five years of CERCLA that it imposed the limitations upon States embodied in Section 114(c).

New Jersey's view—that, if CERCLA priorities dictate that no Superfund monies are immediately available for a Superfund-eligible site, the State should be able to clean up the site with its own special fund monies—ignores Congress' imposition of limits on oil and chemical taxes and its prioritization of the manner in which monies drawn from this source should be spent.

The legislative history of the "may be compensated" formulation of preemption leaves no doubt but that Congress intended to preempt all claims which could be "asserted" or were compensable under CERCLA, whether or not they would actually be paid. The dialogue between Senators Bradley and Randolph upon which the lower court relied is consistent with this legislative history; to the extent either Senator indicated that State

funds could be used for cleanup costs not actually paid by CERCLA, they were referring to monies collected before the statute's effective date or from non-preempted funds.

The subsequent 1984 congressional committee report and EPA guidance memorandum upon which the lower court relied do not justify disregard of the structure and language of CERCLA and its legislative history. Comments in congressional committee reports are not valid legislative history as to earlier enactments, and EPA has no delegated authority to enforce or interpret Section 114(c).

ARGUMENT

I. PREEMPTION PRINCIPLES REQUIRE APPLICATION OF SECTION 114(c) IN ACCORDANCE WITH THE STRUCTURE OF CERCLA AND THE PLAIN MEANING OF THE SECTION'S TERMS.

This is an express preemption case, governed by the principles recently articulated in *Aloha Airlines* v. *Director of Taxation*, 464 U.S. 7 (1983). Section 114(c) of CERCLA indisputably preempts State funds if their "purpose" is "to pay compensation for claims for any costs of response [*i.e.*, cleanup] or damages or claims which may be compensated under" CERCLA. As an express preemption case, the obligation of the courts is to read the terms of the statute and apply them in accordance with their "common-sense meaning" used "in the normal sense." *Metropolitan Life Ins. Co.* v. *Massachusetts*, ____ U.S. ____, 105 S. Ct. 2380, 2389 (1985).

The New Jersey Supreme Court approached this case on a wholly different premise. It held that "courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible." J.S. 23a. It also asserted that "preemption of state law by federal statute is not favored 'in the absence of persuasive reasons . . . that Congress has unmistakenly so ordained.'" *Id.* On this premise, the court disregarded Congress' explicit preemption of State funds whose

"purpose" was to pay claims which are covered by CERCLA when it held that

> "[a]lthough it may be true that many of the purposes to which Superfund moneys are put overlap with the purposes of Spill Fund, this fact alone does not require a conclusion of preemption." J.S. 26a.

On the same premise, the court ignored the structure of CERCLA, transmuted the phrase "may be compensated" into "actually paid," and thereby concluded that Section 114(c) effects "no preemption" of New Jersey's fund.[1]

All but one of the preemption cases referred to by the New Jersey court to justify this approach to construing Section 114(c) dealt with situations where there was no express preemption by a federal statute and where this Court was accordingly itself required to determine whether a State scheme could co-exist with a federal one.[2] Here, of course, Congress'

[1]The lower court conceded that the phrase "may be compensated under [CERCLA] . . . may appear to be clear *language* at first glance." J.S. 24a (emphasis in original). However, it ultimately held that it could "hardly conclude that it conveys a clear and unambiguous *meaning* in light of the purposes and spirit of [CERCLA] as a whole." *Id.*(emphasis in original). Referring to what it termed "Judge Learned Hand's ubiquitous observation of some forty years ago [that] [t]here is no surer way to misread any document then to read it literally" (*id.*), the New Jersey court found that the phrase "may be compensated" was sufficiently ambiguous that room existed to permit the "harmoniz[ation]" of CERCLA and the New Jersey Spill Fund in a fashion which left the latter available to pay any and all cleanup costs, so long as it did not duplicate payments actually made by federal Superfund.

[2]*Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971); *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960).

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977), the single express preemption case cited by the New Jersey Supreme Court (J.S. 24a), illustrates the strict adherence to statutory language required by this Court in such cases. In *Rath*, the Court addressed an express preemption provision that prohibited state regulation of meat packaging and labeling that differed from federal regulations. Once the Court had determined that California's requirements differed from federal requirements, its job was complete. "This explicit pre-emption provision dictate[d] the result in the controversy." *Id.* at 530-31.

intent is statutorily expressed. Thus, courts must apply the language employed by Congress and assume that the ordinary meaning of that language accurately expresses the legislative purpose. *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 97 (1983); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 105 S. Ct. at 2390.

In *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. at 12, this Court articulated the principle which the court below consciously ignored:[3]

> "[W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted."

In concluding that the plain language of the federal statute preempted a Hawaii State tax, the Court admonished the Hawaii Supreme Court for "failing to give effect to the plain meaning of the federal act" by ignoring the distinction between express and implied preemption:

> "The Hawaii Supreme Court apparently considered itself obliged by *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and its progeny to examine thoroughly Congress's intentions before declaring Haw. Rev. Stat. § 239-6 pre-empted. *In re Aloha Airlines, Inc.* 65 Haw. 1, 13-16, 647 P.2d 263, 272-273 (1982). *Rice* and its progeny, however, involved the implicit pre-emption of state statutes. Rules developed in these cases apply when a court must decide whether a state law should be preempted even though Congress has not expressly legislated pre-emption. These rules, therefore, have little application

[3]*Aloha* was decided after this case was argued but before it was decided by the New Jersey Supreme Court. Appellants informed that court by letter of the *Aloha* opinion. However, the court's opinion makes no reference to *Aloha*.

when a court confronts a federal statute like § 1513(a) that explicitly preempts state laws." *Id.* at 12 n.5.

See also, Arizona Public Service Co. v. *Snead*, 441 U.S. 141, 149-50 (1979).

In similarly ignoring the well established distinction between express and implied preemption, the New Jersey Supreme Court mistakenly undertook to "harmonize" the federal and State schemes in accordance with its own assessment of their respective interests. Proper application of the *Aloha* principles requires in this case that the scope of the preemption be determined by an analysis of the statute as Congress wrote it. So applied, these principles dictate the conclusion that New Jersey's fund is preempted by Section 114(c).

II. PREEMPTION OF STATE FUNDS WAS AN ESSENTIAL ELEMENT OF THE COMPREHENSIVE FEDERAL-STATE SCHEME EMBODIED IN CERCLA.

A. Superfund Expenditures Are Directed at Cleaning Up Eligible Sites through Coordinated Federal-State Procedures and Priorities.

The Superfund created by CERCLA has two principal purposes: (1) Payment of "response costs," 42 U.S.C. § 9611(a)(1) & (2)—*i.e.*, the costs either of removing hazardous substances or of taking long-term remedial action to ensure that those substances do not damage the public health, welfare or environment, 42 U.S.C. §§ 9601(23), (24), (25)—and (2) the payment of damages to federal or state governments caused by injury to or destruction of natural resources under their trusteeship as a result of the release of hazardous substances, 42 U.S.C. § 9611(a)(3) & (b).[4]

[4]In addition to response costs and natural resource damages, Superfund is also available for paying other claims under very limited circumstances. 42 U.S.C. § 9611(a)(3) permits the payment of any claim authorized by subsection (b). 42 U.S.C. § 9611(b), refers, *inter alia*, to "claims asserted and compensable but unsatisfied under Section 311 of the Clean Water Act, 33 U.S.C. § 1321." 33 U.S.C. §§ 1321(i) describes such claims. Moreover, 42 U.S.C. §§ 9611(a)(4) & (c) permits Superfund payment of miscellaneous "costs" pertaining to specified studies and programs.

In establishing Superfund, Congress ensured that it was directed toward the sites which most urgently needed attention. CERCLA thus required the President, some of whose responsibilities have been delegated to the Environmental Protection Agency (EPA) while others have been assigned to other federal agencies,[5] to revise and republish the National Contingency Plan (NCP) previously established under the Clean Water Act to include a "national hazardous substance response plan." 42 U.S.C. § 9605. EPA must include within that plan, *inter alia*, "criteria for determining priorities among [sites] . . . throughout the United States for the purpose of taking remedial action and, to the extent practicable . . . for the purpose of taking removal action."[6] 42 U.S.C. § 9605(8)(A).

CERCLA requires that these priorities be based upon careful consideration of input from affected States; for this reason each State must "establish and submit for consideration . . . priorities for remedial action among known [sites] . . . in that State based upon the criteria set forth in" the NCP. 42 U.S.C. § 9605(8)(B). Ultimately, CERCLA required the establishment of a list of at least 400 high priority sites, including among the top 100 at least one such site designated by each State. *Id.* The list identifying high priority sites is an annually revised appendix to the NCP and has come to be known as the "National Priorities List" or "NPL."[7] There are currently 540 sites on the NPL, of which 85 are located in New Jersey.[8] Moreover,

[5]Exec. Order No. 12316, 46 Fed. Reg. 42237 (1981).

[6]" 'Remove' or 'removal' means the cleanup or removal of released hazardous substances from the environment. . . ." 42 U.S.C. § 9601(23).

" 'Remedy' or 'remedial action' means those actions . . . taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24).

[7]40 C.F.R. Part 300, Appendix B.

[8]48 Fed. Reg. 40658, 40669-40673 (1983); 49 Fed. Reg. 19480, 19482 (1984); 49 Fed. Reg. 37070, 37083-37085 (1984); 50 Fed. Reg. 6320, 6321-6322 (1985).

EPA has proposed to include on the NPL an additional 274 sites, of which 12 are New Jersey sites.[9]

The NCP provides that "removal" actions may be undertaken at any site at Superfund expense. Longer term, more expensive "remedial" actions qualify for Superfund reimbursement only at NPL sites. *See* 40 C.F.R. §§ 300.65, .67, .68.

Just as Section 105 of CERCLA contemplates federal-State cooperation in the prioritization of hazardous waste sites, Section 104 of the Act, 42 U.S.C. § 9604, provides for coordinated federal-State response actions to clean up such sites with Superfund assistance. Section 104(a)(1) authorizes the federal government to act "consistent[ly] with the [NCP] to . . . take [necessary] response measure[s] . . . to protect the public health or welfare or the environment. . . ." However, the United States may not undertake long-term remedial (as opposed to removal) actions, unless the State first enters into a contract or cooperative agreement that it will assure all future maintenance of such actions and certifies the availability of a hazardous waste disposal facility. 42 U.S.C. § 9604(c)(3).[10] States must also assure payment of at least 10% of the cleanup costs. *Id.*[11] In short, State cooperation with the federal government is essential to conduct cleanup pursuant to CERCLA.

Indeed, Section 104 contemplates that in many instances the State itself will conduct cleanup with Superfund monies. Section 104(d)(1) permits the federal government to "enter into a contract or cooperative agreement with such State" to arrange for cleanup and to permit the State "to be reimbursed for the reasonable response costs thereof from [Superfund]" pursuant to Section 111(a)(1), 42 U.S.C. § 9611(a)(1). In this fashion, CERCLA assures that State cleanup activities at Superfund-eligible sites will be conducted in a manner which complies with federal standards, including those set forth in the NCP.

CERCLA thus constitutes a determination by Congress that a comprehensive and coordinated federal-State approach to hazardous substance cleanup was necessary to address this nationwide problem, as opposed to a proliferation of conflicting, piece-meal and duplicative State schemes. As stated by Congressman Biaggi, one of the principal drafters of one of CERCLA's predecessor bills, "the effect is to provide a uniform law to replace the multitude of varying state statutes on liability and compensation. . . ."[12]

This view was also expressed in the House of Representatives' rejection of a substitute bill offered by Congressman Stockman, 126 Cong. Rec. 26769 (1980), *reprinted in* 2 Legis. Hist. at 328, which in lieu of a federal Superfund proposed a system of federal grants for State cleanup. *Id.* 26757-26758, *reprinted in* 2 Legis. Hist. at 295-298. Successfully opposing the Stockman proposal, Congressman La Falce stated:

> ". . . we cannot have this comprehensive approach if we allow each State to work its own will and come up with some patchwork quilt across the entire United States of 50 differing laws, 50 differing laws dealing with the taxation of the oil and chemical companies, 50 differing sets of laws dealing with the disposal practices, 50 different laws deal-

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[9] 48 Fed. Reg. 9311, 9312 (1983); 49 Fed. Reg. 40320, 40326-40341 (1984); 50 Fed. Reg. 14115, 14121-14122 (1985).

EPA estimates that, on the basis of its current criteria, between 1400 and 2200 sites will ultimately be added to the NPL. Staff of Joint Committee on Taxation, 99th Cong., 1st Sess., Background and Issues Relating To . . . Superfund, at 21 (Committee Print 1985).

[10] Indeed, unless emergency circumstances require it, the federal government may not undertake even removal actions at a cost of more than $1 million or which require more than six months unless the State complies with 42 U.S.C. § 9604(c)(3).

[11] When the site in question was owned by the State or one of its political subdivisions, it must pay at least 50% of the remedial costs.

[12] 126 Cong. Rec. 26196 (1980), *reprinted in* 2 Library of Congress, Sen. Comm. on Environment and Public Works, 97th Cong., 2d Sess., A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510 at 902 (Committee Print 1983) (hereinafter "Legis. Hist.").

ing with every single aspect of this problem." *Id.* at 26765, *reprinted in* 2 Legis. Hist. at 317.

See also id. at 26769 (remarks of Rep. Martin), *reprinted in* 2 Legis. Hist. at 325-327.

In sum, CERCLA envisions a coordinated federal-State scheme: expenditures from Superfund for long-term remedies of hazardous waste sites are channeled to sites identified on the NPL established by the federal government in cooperation with the States; all response costs, whether "remedy" or "removal," in order to be compensated by Superfund must be federally approved to insure that they are consistent with the NCP.[13]

B. CERCLA Imposed a Special Tax on Oil and Chemicals which Was Not to Be Increased by Duplicative State Taxes.

Eighty-six percent of Superfund derives from a tax imposed upon oil and designated chemicals. Section 211 of CERCLA amended the Internal Revenue Code of 1954 to add two new "environmental taxes:" 26 U.S.C. § 4611, which imposed a tax of .79 cent per barrel on all crude oil received at United States refineries and on petroleum products entering the United States for consumption, use, or warehousing; and 26 U.S.C.

[13]Congress did not envision that Superfund would relieve those responsible for contributing to hazardous waste sites of liability for their cleanup. Instead, it provided that ultimate liability would fall upon those who were responsible for owning or operating such sites or for generating or transporting the wastes found in them. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a). Superfund will not finance any government response costs unless it is first determined that corrective action will not be taken by responsible parties. 42 U.S.C. § 9604(a)(1). Likewise, claimants against Superfund must first make a demand for payment upon responsible parties, if identifiable, before they can have recourse to Superfund. 42 U.S.C. § 9612(a). Moreover, any claims paid by Superfund give the United States, by subrogation, the right to recover any response costs or damage payments from the party responsible under Section 107. 42 U.S.C. § 9612(c)(1).

§ 4661, which similarly imposed a tax varying in amounts from $4.87 to $.24 per ton on 42 designated chemical feedstocks.[14]

These special levies on petroleum and chemicals were designed to raise $1.38 billion over five years. 42 U.S.C. § 9653. With additional appropriations from general revenues of $44 million a year for five years, 42 U.S.C. § 9631(b)(2), CERCLA created a federal Superfund of $1.6 billion.

The three bills which were reported out of committee prior to the enactment of CERCLA—S. 1480, H.R. 7020, and H.R. 85—all provided for a federal Superfund created from special levies imposed upon oil and chemicals.[15] This was justified, at least in part, on the basis of the ease of collection from a limited group of taxpayers; this group was not, by any means, viewed as the sole contributor to the hazardous waste problem which Superfund addresses.[16] S. Rep. No. 848, 96th Cong. 2d Sess. pp. 19-20 (1980), *reprinted in* 1 Legis. Hist. at 326-27.

[14]Oil is not a hazardous substance eligible for cleanup under CERCLA. 42 U.S.C. § 9601(14), (23), (24). Nonetheless, because oil is sometimes used as a feedstock from which such substances are created, it and designated chemicals were taxed to provide monies for Superfund.

[15]*See* 1 Legis. Hist. at 501-509 (S. 1480); 2 Legis. Hist. at 448-459 (H.R. 7020); *id.* at 742-754 (H.R. 85). S. 1341, the administration's proposal, also contemplated such a fund. 3 Legis. Hist. at 45-48.

[16]S. 1480 originally envisioned a tax imposed upon 260,000 generators of hazardous waste. Even though these parties were responsible, in significant measure, for creation of the hazardous waste problem addressed by the bill, it was ultimately amended to impose only a feedstock tax upon oil and chemicals. *See* p. 40, *infra*.

Proposals in the most recent sessions of Congress to amend CERCLA recognize the narrowness of the tax base of Superfund under existing law and uniformly recommend expanding substantially the group of taxpayers paying into the fund. *See, e.g.*, S. Rep. No. 73, 99th Cong. 1st Sess. 13-14 (1985) (report of Senate Finance Committee accompanying S. 51); S. Rep. No. 631, 98th Cong. 2d Sess. 42 (1984) (report of Senate Committee on Environment and Public Works accompanying S. 2892); H.R. Rep. No. 890, Part 2, 98th Cong. 2d Sess. 22-23 (1984) (report of House Committee on Ways and Means accompanying H.R. 5640); 131 Cong. Rec. E3252 (daily ed. July 11, 1985) (remarks of Rep. Hall after introducing H.R. 2948).

One of the most contentious parts of the debate surrounding the passage of CERCLA concerned the size of Superfund and the relative share which the manufacturers and importers of oil and chemicals should be required to contribute. The bill eventually enacted as CERCLA was a last-minute compromise arranged by Senators Stafford, Randolph and others when it became clear, following the 1980 election, that S. 1480 would not pass Congress. In the interest of crafting a bill acceptable to the majority, the drafters of the Stafford-Randolph compromise reduced the size of the fund reported in S. 1480 to the $1.6 billion eventually adopted. *See* 126 Cong. Rec. 30936, *reprinted in* 1 Legis. Hist. 696 (remarks of Sen. Stafford).[17] In addition, they included Section 114(c) to preempt similar state funds.[18]

In imposing CERCLA's special tax burden upon oil and chemicals, care was taken to ensure that these products would not be made unduly expensive and thus be placed at a competitive disadvantage in the international marketplace or cause domestic consumers to pay sharply higher prices. For example, Title III of the Act requires the submission of a report to Congress regarding experience under CERCLA which must, among other things, address "the impact of the taxes imposed by title II of this Act on the nation's balance of trade with other countries. . . ." 42 U.S.C. § 9651(a)(1)(F). Additionally, this report must consider whether "the tax burden falls on the substances and parties which create the problems addressed by this Act" and the "administrative and reporting burdens on Government and industry." Id. at § (G).

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[17]This reduction resulted from the adoption of an amendment proposed during the floor debate by Senator Helms. 126 Cong. Rec. 30936, 30937 (1980), *reprinted in* 1 Legis. Hist. at 698, 699. The importance of reducing the size of the fund to ensure passage of CERCLA is underlined by the fact that the Helms amendment was the only one that the floor managers allowed to be considered. *Id.* at 30916 (remarks of Sen. Baker) *reprinted in* 1 Legis. Hist. 562; Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. of Envt'l Law 1, 20-22 (1982).

[18]*See* discussion at pages 37-43, *infra*.

Senator Cannon, one of the persons principally responsible for the evolution of Section 114(c), *see* pp. 41-42, *infra*, emphasized that the size of the tax burden imposed upon oil and chemicals by CERCLA was of critical concern to those involved in the final evolution of the statute:

> "I strongly support the goal of making the environment safer from pollution by hazardous substances, but this goal must be carried out carefully in order not to have unintended and potentially disastrous impacts on the commerce of this country. It is for that reason that we drafted and submitted amendments responding to concerns raised in the Commerce Committee hearings."

126 Cong. Rec. 30950 (1980), *reprinted in* 1 Legis. Hist. at 734.

Thus, as finally enacted, CERCLA reflected Congress' judgment that, for at least an initial five-year experimental period, a tax on oil and chemicals should contribute $1.38 billion to a federal Superfund and States should not add to that burden by creating their own duplicate funds, a point which even New Jersey has been forced to acknowledge. *See* New Jersey Motion to Dismiss or Affirm, p. 5: "Congress . . . was concerned that States would levy taxes on the chemical and petroleum industries to finance State programs that merely duplicated federal funds."[19]

C. Section 114(c) Was Designed Both to Protect the Coordinated Federal and State Procedures of CERCLA and to Ensure that Oil and Chemicals Would Not Be Burdened by Duplicative State Taxes.

After establishing CERCLA as a "comprehensive" federal-State venture, Congress in Section 114, 42 U.S.C. § 9614, fixed

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[19]While Section 114(c) preempts the creation of all State hazardous substance funds, it is clear that the avoidance of additional special taxes on oil and chemicals was of major concern to Congress. It was generally assumed, on the basis of past experience and political reality, that contributions to any State funds were highly likely to come from the same oil and chemical producers or importers that were to bear the major financial burden of Superfund. *See, e.g.*, 126 Cong. Rec. 26209 (1980) (remarks of Rep. Cleveland), *reprinted in* 2 Legis. Hist. at 939; H.R. Rep. No. 172, Part I, 96th Cong., 1st Sess. 22 (1979), *reprinted in* 2 Legis. Hist. at 532.

the relationships between the federal and existing or future State schemes. In Section 114(c), as well as in other subsections,[20] it permitted States to operate in areas not covered by the federal statute, but barred them from doing so where they would duplicate or potentially undermine the experimental Superfund.

As noted above, access to the federal Superfund for reimbursment of cleanup costs and natural resource damages can be obtained only through coordinated federal-State procedures. If States were permitted to create their own special funds for the purpose of financing cleanup at Superfund-eligible sites within the State, they could circumvent the coordinated State-federal procedures and priorities of CERCLA—for example, by relying upon their own funds to pursue cleanup through their own unsupervised procedures and refusing to enter into the cooperative agreements with EPA required by Sections 104(c) & (d) as a precondition to governmental action under Section 104. Thus, Congress provided in Section 114(c) that "no person may be required to contribute to any [other] fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under [CERCLA]."

Congress did not prohibit the States from using general revenues, whether via taxes or borrowings, to create such funds for cleanup: "Nothing in this section [114(c)] shall preclude any State from using general revenues for such a fund. . . ." Resort to such revenues would impose no special burden

[20]Recognizing that Section 107 of CERCLA imposed direct liability upon site operators, generators and haulers only with respect to response costs and natural resource damages, *see* p. 16, n. 13, *supra*, Congress provided that States were not preempted from imposing additional liabilities or requirements with respect to the release of hazardous substances. 42 U.S.C. § 9614(a). Conversely, having established standards of financial responsibility for owners of vessels and of sites capable of releasing hazardous substances, 42 U.S.C. § 9608, Congress provided that States could not impose potentially conflicting or more rigorous standards. 42 U.S.C. § 9614(d).

on oil and chemical products in the manner feared by Congress.[21] Moreover, if precluded from drawing monies from special groups of taxpayers and instead forced to divert limited State general revenues to finance their own cleanup efforts, States would have every incentive to participate in CERCLA and to coordinate their actions with the federal government.

Finally in Section 114(c), Congress recognized that a special tax or fee might appropriately be imposed "upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects [a] State." Allowing States to impose special taxes to raise these monies would not destroy State incentives to participate in CERCLA, as would be the case if they were allowed to use special funds for cleanup.

Thus, the preemption expressed in Section 114(c) reflects a particular concern on the part of Congress with respect to special funds. Superfund, the centerpiece of CERCLA, was a novel five-year experiment in federal-State cooperation;[22] State cooperation was deemed essential to the success of that experiment.[23] States' preoccupation with their individual funds, particularly if such funds became numerous, could skew the results of this experiment and impose a duplicative burden upon the same products which Congress taxed to establish Superfund.

[21]In any event, Congress can be presumed to have been reluctant under established principles of federalism to dictate to the States the uses which could be made of general revenues.

[22]The novel character of CERCLA is reflected in its five-year "sunset provision," 42 U.S.C. § 9653, as well as the previously noted sections of the Act requiring the submission to Congress of reports having to do with the new uncharted areas encompassed by CERCLA.

[23]The comprehensive report to be submitted to Congress must address "the record of State participation in the system of response, liability, and compensation established by" CERCLA. 42 U.S.C. § 9651(a)(1)(E).

III. THE PLAIN MEANING OF SECTION 114(c) SHOWS THAT NEW JERSEY SPILL FUND IS PREEMPTED.

A. The Purpose of New Jersey's Spill Fund Is to Pay for Cleanup Costs and Damages which Are Eligible for Compensation under CERCLA.

New Jersey has done the very thing that Section 114(c) forbids. Its Spill Fund is financed by a tax upon petroleum and chemical products, NJS 58:10-23.11h(b), and has as its principal purpose the financing of cleanup costs undertaken by New Jersey at the very sites which are eligible for federal Superfund compensation.

NJS 58:10-23.11h(a) provides that the purpose of the tax imposed by New Jersey is "to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances." Similarly, the first-listed allowable disbursement from the fund, *see id.* at § 23.11o(1), are "costs incurred under section 7 of this act," NJS 58:10-23.11f, and Section 7, in turn, provides for reimbursement to New Jersey's Department of Environmental Protection (DEP) for its cleanup costs. Moreover, Section 7 provides that such cleanup costs shall, "to the greatest extent possible, be in accordance with the National Contingency Plan [NCP]" which is now administered pursuant to Section 105 of CERCLA. Of course, the NCP-consistent expenditures at which Spill Fund was targeted are the very expenses which "may be compensated" under CERCLA. *See* pp. 12-14, *supra*.[24]

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[24]Spill Fund has subsidiary purposes that do not duplicate those of CERCLA. Unlike CERCLA, under Spill Fund, oil and petroleum products are considered "hazardous substances." Thus, under Spill Fund, unlike CERCLA, oil spill cleanup can be compensated. Moreover, while some of the "damages" which may be compensated by Spill Fund, NJS 58:10-23.11o, include the destruction of natural resources held in trust by the State and would be included within the allowable damages charged against Superfund, NJS 58:10-23.11g(a)(1) & (2), other damages covered by Spill Fund would not be compensable under CERCLA. Finally, the New Jersey fund can also be used for certain administrative and research costs. However, the New Jersey Act specifically provides that these research costs cannot exceed the amount of interest which is credited to the fund. NJS 58:10-23.11o(3) & (5).

The record before the Tax Court at the time of its decision disclosed that cleanup of oil spills constituted only 1% of the expenditures from Spill Fund and that the damages and administrative and research costs totalled less than 5%. Doubtless because of their *de minimis* proportions, New Jersey does not contend and the State Supreme Court did not hold that these incidental purposes save Spill Fund from the preemption of Section 114(c).

New Jersey ignores the stated purpose of the tax imposed to create Spill Fund and contends that the statute is to be judged solely by the way in which the State has chosen to make expenditures from the fund. (N.J. Motion to Dismiss, pp. 9 and 15). Under this reasoning, New Jersey can collect a tax designed by its legislature for a preempted purpose so long as the monies are not improperly expended. But Section 114(c) preempts on the basis of the "purpose" of the tax when enacted, not subsequent decisions by administrators as to how monies are spent.

Thus, the dispositive fact here is that when Spill Fund was enacted in 1977, the tax rate which it imposed upon oil and chemicals was fixed to accomplish the Act's broad purpose of cleaning up hazardous waste sites in accordance with the NCP. That rate has never been reduced, even though CERCLA now directs that Superfund monies shall be expended at these sites consistent with the NCP.

The fact is, New Jersey foresaw the possibility that "Congress [might] enact[] legislation providing compensation for the discharge of petroleum and hazardous products" and the legislature directed that, in the event of such federal legislation, there should be both a determination as to "what degree that legislation provides the needed protection for [New Jersey's] citizens, businesses and environment" and "appropriate recommendations to the Legislature for amendments to [Spill Fund]." NJS 58:10-23.11z. However, despite CERCLA's imposition of a $1.38 billion tax upon oil and chemicals and despite its targeting of these monies at the same sites which are the

focus of New Jersey's Spill Fund, no amendments have been made to the New Jersey Act to conform it to CERCLA. Thus, appellants have been forced to continue to pay taxes to New Jersey whose purpose is to finance cleanup costs and damages which are now eligible for compensation under CERCLA.

B. The Plain Meaning of "May Be Compensated" Requires Preemption of New Jersey's Spill Fund.

While it appears to be common ground that the purpose of Spill Fund brings it within the ambit of Section 114(c), appellants and the State disagree as to the meaning of the phrase "may be compensated" as used in that section.

Appellants contend that this term connotes eligibility for, rather than actual payment of, compensation under CERCLA: all State response costs that are consistent with the NCP—"removal" costs, no matter where incurred, and all State "remedial" costs at sites meeting the criteria set forth in the NCP for inclusion on the NPL—are eligible for compensation and thus "may be compensated" under CERCLA within the meaning of the preemptive language of Section 114(c).[25] New Jersey's Spill Fund is invalid under this formulation, because the very purpose of the New Jersey statute is to fund cleanup expenditures consistent with the NCP.

New Jersey argues that Section 114(c) does not bar special tax funding of State cleanup expenditures on Superfund-eligible sites, even those which are incurred at National Priorities List sites, since "inclusion on the NPL does not guarantee that compensation will be provided but merely constitutes the first step for qualifying for Superfund financed remedial action." Motion to Dismiss or Affirm at 20. Thus, New Jersey contends that Section 114(c) only preempts disbursements from State funds for cleanup costs which are actually compensated by federal Superfund. *Id.* According to the State, if CERCLA priorities dictate that there are inadequate Superfund monies presently available to clean up a site, the State can use its own

[25]*See* pp. 12-15, *supra*.

special fund for this purpose. To justify this approach, New Jersey interprets the phrase "may be compensated" as though it reads "are" or "are actually compensated."[26]

It is axiomatic that "the starting point in every case involving construction of the statute is the language itself." *Landreth Timber Co.* v. *Landreth*, ____ U.S. ____, 105 S. Ct. 2297, 2301-02 (1985). *See also Bowsher v. Merck & Co.*, 460 U.S. 824, 830 (1983); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). Preemption cases, like all others, give this Court "no choice but to 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Metropolitan Life Ins. Co.* v. *Massachusetts*, ____ U.S. ____, 105 S. Ct. at 2389, *citing Park'n Fly Dollar Park* v. *Park and Fly*, ____U.S. ____, 105 S. Ct. 658, 662 (1985).[27] The plain meaning of the term "may be compensated" supports appellants' reading of the statute and is inconsistent with the view advocated by New Jersey.

"May be" plainly connotes the potential for compensation under CERCLA, not its certainty as argued by New Jersey.

[26]The Motion to Dismiss or Affirm (p. 10-11 n.*) implies that no Spill Fund money has been expended on Superfund-eligible sites and expressly states that no Spill Fund money has been spent on sites receiving federal funds. This is simply not so. The official reports filed by the State Auditor in accordance with NJS 52:24-4.2 and lodged by appellants with the Court reveal that in the fiscal years ending June 30, 1981 and June 30, 1982, out of $33,432,300 expended from Spill Fund, $31,453,500—or more than 90%—was spent on 10 sites which are included on the NPL. Auditor's Report, May 13, 1983, Schedule I, p. 11. Indeed, $30,905,600 was spent on two sites which actually received federal monies, albeit in amounts that were far less than those spent by New Jersey on these sites. *Id.* & *id.* at 12, Schedule II. *See* 48 Fed. Reg. 40669 (1983), amended by 49 Fed. Reg. 19482 (1984); 48 Fed. Reg. 37082 (1984).

[27]In *Metropolitan Life*, this Court broadly read the preemption clause of the federal statute there at issue, but ultimately found the challenged State action not to be preempted by virtue of an explicit exception to the preemption clause. Here, New Jersey has never contended that Spill Fund falls within any such exceptions.

See Bennett v. *Panama Canal*, 475 F.2d 1280 (D.C. Cir. 1973); *John Reiner & Co.* v. *United States*, 325 F.2d 438, 441 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964). Thus, eligibility for compensation was the focus of Section 114(c)'s preemption, not actual payment. Had Congress intended that Section 114(c) be interpreted in the manner advocated by New Jersey, it surely would have used the terms "are" or "are actually" to modify the term "compensated."[28]

Second, as we emphasized in Part III.A. above, Congress preempted State funds on the basis of their "purpose" when established by the State legislature, not the spending decisions made by fund administrators. Because Section 114(c) focused on the legislative purpose of State funds, Congress had to describe prospectively and in general terms the type of claims which could not be paid by them. Thus, it preempted funds whose purpose was to pay claims which "may be compensated" under CERCLA, *i.e.*, claims of the type that would be eligible for compensation under the federal Act.

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[28]The lower court found ambiguity in Congress' use of the term "may" by relying on cases like *Kraft* v. *Board of Education*, 247 F. Supp. 21, 24-25 (D.D.C. 1965), *cert. denied*, 386 U.S. 958 (1967) (J.S. 25a), where "shall" has been substituted for "may" in situations involving the delegation of ministerial power to a public official. The *Kraft* line of cases is distinguishable on two separate grounds.

First, the mere substitution of the word "shall" for "may" in Section 114(c) would be awkward; if Congress had intended to achieve the result reached by the lower court, it would have preempted funds whose "purpose" is to pay "any costs of response or damages or claims which [are or are actually] compensated," not "which [shall be] compensated under this chapter."

Second, the substitution of "shall" for "may" is only appropriate in cases where courts decide that the legislature intended to impose a duty, rather than confer discretion upon a public official. *United States* v. *Thoman*, 156 U.S. 353, 359 (1895). Even in such cases, this transformation of statutory language is permissible only "where it is necessary to give effect to the clear policy and intention of the Legislature. . . ." Only then can "such a liberty . . . be taken with the plain words of the statute." *Id.*, *citing Thompson* v. *Carroll's Lessee*, 22 How. 422, 434 (1860).

The "are actually compensated" construction of Section 114(c) imposed by the lower court, by contrast, is not a generic description of the type of claims for which a State may not create a fund. It thus provides no guidance to State legislatures in their imposition of taxes. The "are actually compensated" formulation of preemption is, instead, a direction to fund administrators not to pay particular claims which have already been compensated by Superfund.

Third, it is manifest that Congress intended to preempt some kinds of forced contributions to State funds when it adopted Section 114(c). However, the "are actually compensated" formulation of preemption would *never* result in preemption. State funds whose purpose is to pay costs, damages or claims which "are actually compensated" by Superfund need no support from State taxes or other forms of forced contribution, since there would never be any net disbursements from such funds. For Section 114(c) to have any meaning it must preempt funds whose purpose is to pay costs, damages or claims that "may be," but are not actually compensated by Superfund.

Finally, as we have shown above in part II, respect for the language in which Congress chose to cast the preemption provisions of Section 114(c) is essential to fulfill the policies underlying that section of discouraging States from resorting to specially-raised funds that would allow them to pursue cleanup priorities outside the comprehensive federal-State program of CERCLA and of preventing duplicative taxation. Under New Jersey's view, States could maintain special funds of unlimited sizes through taxation of the same oil and chemicals which finance Superfund and could proceed independently with cleanup, without any federal coordination, at Superfund-eligible sites by using such funds.

C. New Jersey's Construction of Section 114(c) Renders It Meaningless.

New Jersey's construction of Section 114(c) as barring only disbursements from a special fund for cleanup costs which are

actually compensated by Superfund renders the section virtually meaningless. This is so because the preceding section of CERCLA, Section 114(b), 42 U.S.C. § 9614(b), insures that response costs which are actually compensated by Superfund may not also be compensated by State funds. It provides that

> "[a]ny person who receives compensation . . . pursuant to [CERCLA] shall be precluded from recovering compensation for the same removal cost or damages or claims pursuant to any other State or Federal law."

Thus, Section 114(b) performs the very function which New Jersey would find in Section 114(c) by its "are actually compensated" reading of the section. Since every provision of a statute should, if possible, be construed to have meaning, *Bowsher* v. *Merck & Co.* 460 U.S. 824, 833 (1983); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955), New Jersey's reading of Section 114(c) should be rejected.

Second, as previously noted, p. 21, *supra*, a proviso to Section 114(c) makes clear that general revenues may be used for purposes for which special funds may not be used: "Nothing in this section shall preclude any State from using general revenues for such a fund. . . .," *i.e.*, to pay "response costs or damages . . . which may be compensated" under Superfund. If, as New Jersey argues, Section 114(c) only preempts State special funds from paying response costs that are actually compensated by Superfund, this proviso would mean that States are free to create general revenue funds for State response costs which are actually compensated by Superfund. But Section 114(b) precludes such duplicate compensation by both federal and State funds. For the general revenue proviso to have any meaning, the "fund" to which it refers must be one which permits the payment of monies that "may be," but are not actually compensated under Superfund.

Finally, Congress found it necessary in Section 114(c) to make it explicit that

> "Nothing in this section shall preclude any State from . . . imposing a tax or fee upon any person or upon any substance in order to finance the purchase of prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State."

This disclaimer as to the scope of the preemption clause also has no meaning under New Jersey's view of Section 114(c). Unless Congress intended Section 114(c) broadly to preempt taxes or fees upon particular persons or substances to pay State cleanup costs, there was no reason for it to make clear that such special taxes or fees could be used for the State to incur the limited costs described by this proviso to Section 114(c).

In *Connecticut Department of Income Maintenance* v. *Heckler*, ____U.S. ____, 105 S. Ct. 2210, 2213 (1985), this Court refused to construe a statute in a way that would render "unnecessary and illogical" an express exception to its operation. *Cf. Metropolitan Life Ins. Co.* v. *Massachusetts*, 105 S. Ct. at 2390. Here, construing Section 114(c) as only preempting the use of special State funds to pay cleanup costs that are actually compensated by federal Superfund would render "unnecessary and illogical" the explicit provisos in that section authorizing the use of general revenues for cleanup costs and of special funds for limited preparatory expenses.

D. The Solicitor General's Suggestion that Section 114(c) Preempts Only State Funds Established to Pay Third-Party Costs is Without Merit.

In response to this Court's request for a brief *amicus curiae* from the United States prior to the Court's decision to note probable jurisdiction, the Solicitor General asserted an alternative analysis of Section 114(c). That analysis conceded the preemptive purpose of Section 114(c) and did not endorse New Jersey's "actually paid" construction of "may be compensated." However, it would on other grounds validate Spill Fund to the extent it is used to pay New Jersey's, as opposed to third-

parties', response costs and damages, even though they are eligible for compensation by Superfund.

The Solicitor General argues that payment by a State fund of cleanup expenses or damages incurred by the State is not "compensation" for a "claim" within the meaning of Section 114(c). Thus, in his view, States are preempted only from establishing special funds to pay response costs or damages incurred by third parties. This view of the statute is untenable.

First, under CERCLA a "claim" is a "demand in writing for a sum certain." 42 U.S.C. § 9601(4). A "claimant" is "any person who presents a claim for compensation. . . ." 42 U.S.C. § 9601(5). A "State" is specifically defined to be a "person" within the meaning of the Act. 42 U.S.C. § 9601(21). Accordingly, States must file "claims" for "compensation" when they seek Superfund reimbursement. *See* 42 U.S.C. §§ 9611(a)(3) & (b) regarding the assertion of "claims" by States against Superfund for natural resource damages. *See also* 42 U.S.C. § 9612(b)(2)(C): "[N]o payment may be made on a claim asserted on behalf of [a] State or any of its agencies or subdivisions unless the payment has been approved by [EPA]." Therefore, when Congress barred the use of special State funds "to pay compensation for claims for any costs of response or damages," it surely had in mind the types of claims for compensation which States customarily file under Superfund and did not limit that term to the payment of third party claims.

Second, under Section 114(b) "[a]ny person who receives compensation for removal costs or damages or claims pursuant to any other . . . federal or State law shall be precluded from receiving compensation for the same removal costs [etc.]" under CERCLA. Congress surely intended that a State agency, such as New Jersey's DEP, could not receive duplicative "compensation" from both a state fund and Superfund. DEP must, therefore, be a "person who receives compensation" within the meaning of Section 114(b) and similarly must be a recipient of "compensation" within the meaning of Section 114(c).

Third, the stated purpose of the tax levied by New Jersey upon petroleum and chemicals to create Spill Fund "is to ensure compensation for cleanup costs and damages associated with any discharge of hazardous substances. . . ." NJS 58:10-23.11h(a). The "compensation for [such] cleanup costs" is received by DEP. *See id.* at 23.11o(1), 23.11f.

The New Jersey fund is administered by an official appointed by the State Treasurer, NJS 58:10-23.11j. Spill Fund is strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained. NJS 58:10-23.11g. DEP, under certain statutorily defined circumstances, is expressly required to present claims for compensation to the administrator of the New Jersey fund. *See, id.* at 23.11f(c). Although the statute is silent as to the precise procedures used by DEP under other circumstances where it is authorized to draw money directly from the fund, *id.* at 23.11f(a), it seems certain that they involve some sort of "demand in writing for a sum certain"—*i.e.*, a "claim" as defined in CERCLA. In any case, it is inconceivable that Congress intended the preemptive effect of Section 114(c) to turn upon the administrative mechanisms adopted by a State for purposes of paying response costs—*i.e.*, whether the State agency has to file claims or whether it can make direct withdrawals without so filing.

Fourth, like the approach urged by New Jersey, the Solicitor General's construction of the statute makes "unnecessary and illogical" the explicit proviso in Section 114(c) allowing special funds to finance State purchase of response equipment. If Section 114(c) preempts only third-party response costs, there was absolutely no need to authorize the limited State expenditures from the special fund contemplated by this proviso.

Finally, the Solicitor General's approach to the statute would not serve any of the policies which Congress sought to further when it adopted Section 114(c)—*i.e.* to ensure that States would direct their response efforts through the coordinated federal-state mechanisms of CERCLA and to limit the special

tax burden imposed upon oil and chemicals. The Solicitor General's approach would leave the States free to create special funds of unlimited size and allow them to pursue cleanup wholly outside the framework of CERCLA.[29]

E. The Rationale for the New Jersey Supreme Court's Avoidance of the Plain Meaning of the Terms of Section 114(c) Was Mistaken.

1. The New Jersey Court Both Misunderstood and Gave Undue Weight to the Debate Between Senators Randolph and Bradley.

A key element in the lower court's disregard of the explicit terms of Section 114(c) was its reliance upon the exchange between Senators Randolph and Bradley regarding preemption. We show in Part IV.B. below, pp. 43-46, that, properly understood, this exchange recognizes that claims which are eligible for compensation under CERCLA are preempted and thus supports appellants' reading of Section 114(c). In any event, a wealth of other legislative history regarding CERCLA clearly establishes that the operative premise for preemption was eligibility for compensation from Superfund, rather than actual payment.

2. Statements by a Subsequent Congressional Committee Should Not Be Relied Upon to Contradict the Plain Meaning of Section 114(c).

As further support for its decision, the New Jersey Supreme Court referred to a bill introduced but not passed in 1984, four years after CERCLA was enacted. It found in a House committee report relating to the bill (H.R. Rep. No. 890, Part I,

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[29]The Solicitor General has also questioned the premise that the phrase "may be compensated" modifies "response costs or damages." He argues that payments of "response costs" and "damages" are preempted, even if not eligible for CERCLA compensation. While appellants would not be adversely affected by this broad reading of Section 114(c), they do not embrace it. Here, it suffices to show that the avowed purpose of New Jersey's Spill Fund was to raise money to expend on State cleanup and damages at Superfund-eligible sites.

98th Cong., 2d Sess. (1984)) authority for its conclusion that CERCLA preempts State funds only when they are expended for cleanup activities actually compensated by Superfund. J.S. 30a-31a & n.8.

The views of a subsequent Congress at best "form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 119 (1980); *South Carolina* v. *Regan*, ____ U.S. ____, 104 S. Ct. 1107, 1115 n.7 (1984). This is especially true when those views are set forth only in legislative reports, *id.*; *a fortiori*, reports which have not led to the enactment of legislation are a most precarious basis upon which to interpret prior legislation. *Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981).

Moreover, as the report itself reveals, the dispute between appellants and New Jersey as to the scope of CERCLA's preemption was known to its authors. H.R. Rep. No. 890 at 58-59. This further diminishes the report's reliability as a fair and objective guide to an earlier Congress' intentions.

3. EPA'S Guidance Memorandum Does Not Provide a Reliable Basis for Construing Section 114(c).

The New Jersey Supreme Court also relied upon a comment contained in an unpublished EPA memorandum.[30] The "Executive Summary" to this memorandum states that Section 114(c) of Superfund "does not apply to State funds which are used *** *** To compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by [Superfund] but for which no federal reimbursement is provided." J.A. 10-11. The lower court erred in giving weight to this interpretation.

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[30]Office of Emergency and Remedial Response, U.S. Environmental Protection Agency, Guidance: Cooperative Agreements and Contracts with States Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510) (March 1982), J.A. 4-11.

While implementation of various provisions of CERCLA has been delegated to EPA, Section 114(c) is not one of them.[31] Thus, in adopting the position of the federal defendants and dismissing the complaint in *New Jersey* v. *United States*, 16 Envtl. Rep. Cas. [BNA] 1846 (D.D.C. 1981), the court stated:

> "It is undenied that the United States has genuinely taken no position on the scope of Section 114(c), and does not even have in place an administrative mechanism for formulating an authoritative position on the section. There has been no delegation of power from the President to any agency to enforce the section, as there has been with other provisions in the Superfund legislation, *see* Exec. Order 12286, 46 Fed. Reg. 9901 (1981), and there is no expectation that such a delegation will occur soon." *Id.* at 1849.

Since EPA has not been delegated the authority to enforce Section 114(c), no particular deference should be accorded to its interpretation. *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 565-67 & n.21 (1979); *Goolsby* v. *Blumenthal*, 581 F.2d 455, 480 (5th Cir. 1978), *cert. denied*, 444 U.S. 970 (1979); *Veterans Admin. Med. Cent.* v. *Federal Labor Rel. Auth.*, 732 F.2d 1128, 1132 n.7 (2d Cir. 1984).[32] Thus, the question presented in this case is one of statutory construction readily susceptible of judical resolution without assistance from an administrative agency. *Bureau of Alcohol, Jobs & Firearms* v. *FLRA*, 464 U.S. 89 (1983); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 41 n.27 (1977).

There are other factors which further erode the deference which should be accorded the EPA comments. The relative

[31] *See* Exec. Order No. 12316, 46 Fed. Reg. 42237 (1981); Exec. Order No. 12286, 46 Fed. Reg. 9901 (1981).

[32] The decision by both Congress and the President not to delegate authority to EPA regarding the preemption issue undoubtedly stemmed from its lack of expertise with respect to such questions. An agency's lack of expertise constitutes a further ground not to defer to its interpretation of a statute. *FCC* v. *RCA Corp.*, 346 U.S. 86, 91 (1952).

weight to be given to the judgment of an administrative agency in a particular case depends upon "the thoroughness evident in its consideration, the validity of reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The EPA memorandum is deficient in all these respects. It was issued by a lower official of the EPA. It was not preceded by any notice or comment. On its face, the memorandum shows that it is not based on any analysis of Section 114(c).

The stated purpose of the EPA memorandum is to provide instructions to EPA regional offices on the use of cooperative agreements and contracts with States for planning and implementing remedial or certain cleanup actions under CERCLA. Nowhere in the body of the document is there any mention of preemption of State taxation. That subject is outside the scope of the memorandum.

The "executive summary" assertion as to Section 114(c) is, therefore, wholly gratuitous, and is not supported by any policy, legal or other rationale. Where an agency does not reveal the reasoning that went into its interpretation of a statute, its position should be accorded little deference. *SEC* v. *Sloan*, 436 U.S. 103, 117-18 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 627 (1971); *Northern Colo. Water Conservancy Dist.* v. *FERC*, 730 F.2d 1509, 1519 (D.C. Cir. 1984).[33]

In addition, the EPA memorandum is contrary to the position which the agency itself has previously taken. In pro-

[33] An additional ground for refusing to credit the interpretation of Section 114(c) set forth in the EPA memorandum is its imprecision in discussing the preemptive effect of that section. The EPA memorandum asserts that State funds are not preempted "where no federal reimbursement is provided," whereas Section 114(c) defines preemption in terms of claims which "may be compensated" under CERCLA. The term "reimbursement" is not defined in CERCLA nor is it used in Section 114(c).

mulgating the NCP, EPA encouraged States only to "undertake response actions *which are not eligible* for federal funding." 40 C.F.R. § 300.24(c) (emphasis added). The guidance memorandum's assertion that States may use their own funds for response costs which are "eligible to be financed by [Superfund]" is thus inconsistent with the NCP itself.

Finally, EPA's position in the guidance memorandum departs from the position asserted on its behalf by the Department of Justice in *New Jersey* v. *United States*. The inconsistent views which have been taken as to the EPA's authority to interpret Section 114(c), as well as the meaning which should be given to it, show that the view expressed in the EPA guidance memorandum is not entitled to any weight in this Court. *Montana* v. *Blackfeet Tribe of Indians*, ____ U.S. ____, 105 S. Ct. 2399, 2404-05 n.7 (1985), *affirming* 729 F.2d 1192, 1202 (9th Cir. 1984); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. at 565-67 n.20; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858 n.25 (1975).

IV. THE LEGISLATIVE HISTORY OF CERCLA CONFIRMS APPELLANTS' INTERPRETATION OF SECTION 114(c).

The structure of CERCLA and the plain meaning of the language of Section 114(c) so clearly evidence the intention of Congress to prevent duplicative taxation of oil and chemicals to support State funds whose purposes are covered by Superfund that no recourse to the legislative history of the section is necessary. *Cf. TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). In any event, that legislative history negates both New Jersey's interpretation that preemption is limited to claims "actually paid," as well as the Solicitor General's argument that Section 114(c) does not preempt a special fund to the extent it is used to pay cleanup costs and damages incurred directly by a State.

A. Congress Intended to Preempt Special Funds whose Purpose Was to Pay for All Response Costs and Damages which are Eligible for Compensation under CERCLA, Even if They Are Not "Actually Paid."

CERCLA was a compromise achieved on the basis of four predecessor bills: H.R. 7020, 96th Cong. 2d Sess. (1980) (inactive waste sites); H.R. 85, 96th Cong. 2d Sess. (1980) (spills of oil and hazardous substances into navigable waters); S. 1341, 96th Cong. 1st Sess. (1979) (oil and hazardous waste and inactive sites);[34] S. 1480, 96th Cong. 2d Sess. (1980) (coverage was basically the same as CERCLA as eventually passed). *See* 1 Legis. Hist. at V-VII.

Both H.R. 85 and S. 1341, the administration's proposal, contained preemption provisions.[35] Section 612(a) of S. 1341 provided that:

> "(1) No action may be brought in any court of the United States, or of any State or political subdivision thereof, for damages for an economic loss or cost described in subsection (a) of section 607 of this title, a claim for which may be asserted under this title, and
>
> "(2) No person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss or cost, nor to establish or maintain evidence of financial responsibility relating to the satisfaction of a claim for such a loss or cost. . . ."[36]

Thus, S. 1341 clearly contemplated the preemption of payment of "claims . . . which may be asserted"—*i.e.*, those which were eligible for compensation—as opposed to those which would be actually paid.

Moreover, under Section 607(a) of S. 1341, States could assert claims against the fund for removal costs associated with oil or hazardous substance spills. *Id.* § 607(a). Thus, S. 1341's preemption provision clearly applied to contributions to a State fund, the purpose of which was to pay for claims by States for removal costs relating to oil or hazardous substance spills.

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[34]S. 1341 was also introduced in the House of Representatives as H.R. 4566 and H.R. 4571, both of the 96th Cong., 1st Sess. (1979). *See*, 3 Legis. Hist. 23.

[35]Neither H.R. 7020 nor S. 1480 as originally reported preempted state funds.

[36]3 Legis. Hist. 57.

H.R. 85's preemption provisions were similar to the one finally adopted as Section 114(c). This bill created two funds, one for cleanup of spills of petroleum and the other for hazardous substances in navigable waters. §§ 521, 522, *reprinted in* 2 Legis. Hist. at 873-77. Mandatory contributions into State funds to finance the removal of both oil and other hazardous substances were preempted by Sections 110 and 302, respectively. These sections of the bill provided that "no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a *compensable damage* under title V . . ." of the bill. §§ 110(a)(2), 302(a) (emphasis added), *reprinted in* 2 Legis. Hist. at 1051, 1075.

Title V of H.R. 85, in turn, expressly defined "compensable damages" as including damages which could be "asserted for . . . removal costs . . . [or] injury to, or destruction of, natural resources. . . ."[37] Thus, just like S. 1341, H.R. 85 preempted the payment for all cleanup and natural resource damages which could be "asserted" under the bill, not merely those which would be actually paid.

Moreover, the House Merchant Marine and Fisheries Committee Report on H.R. 85 provides that a

> "State can and is expected to be a claimant under the legislation. . . . Once a State expends money for removal costs, it may claim compensation for that item of damages under the procedures outlined in the bill." H.R. Rep. No. 172, Part 1, 96th Cong., 1st Sess. 23 (1979), *reprinted in* 2 Legis. Hist. at 533.

Since "compensable damages" under H.R. 85 included State claims for removal costs, the legislative history of H.R. 85 refutes the Solicitor General's argument that the New Jersey Fund is not preempted from paying State claims for cleanup costs.

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[37] § 531(a)(1)(A), *reprinted in* 2 Legis. Hist. at 877, id. § 301(a)(1), *reprinted in* 2 Legis. Hist. at 826-27; *see* H.R. Rep. No. 172, Part 2, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 2 Legis. Hist. at 619.

The sponsors of H.R. 85 clearly articulated in debate the broad scope of its preemption provisions. For example, Mr. Biaggi, the bill's sponsor, stated that H.R. 85

> "prohibit[s] a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for an oil spill damage claim as defined in Title V of the bill. Thus, the State cannot impose a fee or a tax on oil if that fee or tax is to go into a fund and the fund is for the purpose of paying oilspill damage claims." 126 Cong. Rec. 26196-26197 (1980), *reprinted in* 2 Legis. Hist. at 903.

In response to a question by Rep. Florio, Rep. Biaggi stated that "the purpose of [§ 110] is to prohibit States from creating duplicate funds to pay damages compensable under H.R. 85." *Id.* at 26196-26197, *reprinted in* 2 Legis. Hist. at 904.[38] Mr. Biaggi clearly intended to eliminate duplicative State funds:

> "A patchwork of oil spill liability and compensation laws on the Federal and State levels can only create excessive bureaucracies and a quilt of paperwork which would stretch beyond the imagination.
>
> "How can the various affected industries and transportation modes be able to cope with 50 or more liability and compensation schemes and funds which I am sure are going to be varied and complex? The burden we are imposing—if we do not preempt State laws in this field—will only create a greater burden on you and I—the paying consumer. I sympathize with those who advocate State's rights, but I have considerably more sympathy for the paying consumer."

125 Cong. Rec. 385 (1979), *reprinted in* 2 Legis. Hist. at 470.

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[38] *Accord id.* at 26209, *reprinted in* 2 Legis. Hist. at 939 (remarks of Rep. Cleveland); *id.* at 26207, *reprinted in* 2 Legis. Hist. at 932 (remarks of Rep. Roberts); *id.* at 26198, *reprinted in* 2 Legis. Hist. at 906 (remarks of Rep. Snyder).

S. 1480, as originally introduced contemplated the collection of fees from at least 260,000 generators of hazardous waste. However, the bill, as reported out of Committee in July 1980, imposed only a tax on basic feedstocks (primary petrochemicals, inorganic raw materials and oil), thereby reducing the number of taxpayers to less than 1,000. *See* S. Rep. 96-848, 96th Cong. 2d Sess. 20 (1980), *reprinted in* 1 Legis. Hist. at 327. The bill at this stage did not contain a preemption clause.

The first proposed amendment to S. 1480 which involved preemption of State funds was introduced in August 1980 by Senator Magnuson. 126 Cong. Rec. 21071 (1980), *reprinted in* 3 Legis. Hist. at 70. Section 15 of his amendment provided that "no person may be required to contribute to any fund by any Federal, State, or other law, the purpose of which is to pay compensation for any loss which *may be compensated* under this title." 3 Legis. Hist. at 107 (emphasis added). Senator Magnuson's version of preemption was the first to use the "may be compensated" formulation.

His proposal was never acted upon. It did, however, prompt a written objection from the head of the New Jersey DEP dated September 11, 1980, to this formulation of preemption of State funds:

> "In any discussion of preemption it is important to point out that the language is critical: some ways of drafting it are much worse than others. *The formula used in Sen. Magnuson's amendment, which is virtually the same as that in the House oil-spill bill, H.R. 85,* prohibits the creation of duplicative funds 'the purpose of which is to pay compensation for any loss which may be compensated under this title.'" *The Environmental Energy Response Act: Hearings on S. 1480, Senate Committee on Finance,* 96th Cong. 2d Sess. 591 (1980) (emphasis added).

Thus, New Jersey recognized that the "may be compensated" formulation of preemption proposed by Senator Magnuson was "virtually the same" as H.R. 85, which, as shown

above, embodied the concept of eligibility for compensation, rather than actual payment. New Jersey made it very clear that it opposed this type of preemption:

> "The effect of this kind of language we have termed 'swiss-cheese preemption,' because it would shoot holes in State laws only to the extent incidents or damages are compensable under the federal law, leaving the rest intact." *Id.*

New Jersey itself therefore understood, contrary to its present arguments and the holding of the lower courts, that the "may be compensated" version of preemption implied general eligibility for compensation—not "actual compensation"—and would preempt aspects of the New Jersey Spill Fund.

On September 24, 1980, Senator Cannon also introduced proposed amendments to S. 1480, one of which provided for the preemption of duplicative State funds. His explanation for this amendment stated:

> "This amendment provides that *claims that may be asserted* under this act (other than claims relating to closed hazardous waste disposal facilities) may not be asserted under other laws and that the states are preempted from establishing funds or imposing financial responsibility requirements for such claims. . . . This amendment is consistent with both S. 1341, the administration's proposal, and H.R. 85, the House companion bill which passed the House on September 19, 1980."[39]

Like all other predecessor versions of preemption, the one proposed by Senator Cannon contemplated the payment of any claims which might be "asserted" under the statute, not merely those which would actually be paid.

CERCLA, as finally enacted, was introduced in the Senate on November 24, 1980, as an amendment to H.R. 7020.[40] The

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[39]126 Cong. Rec. 27086 (1980), *reprinted in* 3 Legis. Hist. at 186 (emphasis added).

[40]*See* 126 Cong. Rec. 30987 (1980), *reprinted in* 1 Legis. Hist. at 771-772.

terms of Section 114(c) of the Act derived from the amendments proposed by Senator Magnuson and Senator Cannon to bring S. 1480 into conformity with the preemption provisions of H.R. 85 and S. 1341.

This is confirmed by the introductory remarks of Rep. Florio when CERCLA was sent to the House for a vote:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while *States may not create duplicate funds to pay damages compensable under this bill*, there is no preemption of the State's ability to collect taxes on fees for other costs associated with releases that are not *compensable damages* as defined in this legislation. . . ." (emphasis added).

126 Cong. Rec. 31965 (1980), *reprinted in* 1 Legis. Hist. at 780.

As the above discussion makes clear, there was a consistent understanding by all of the drafters of preemption provisions of the bills which preceded CERCLA that State funds would be preempted from paying cleanup costs or damages which were eligible for compensation by Superfund. From S. 1341's preemption of "claims . . . which may be asserted," through H.R. 85's preemption of "compensable damages" defined as damages which could be "asserted," through the "may be compensated" formulation as first proposed by Senator Magnuson and as ultimately set forth in Section 114(c), the preemption language was carefully chosen to include all claims that could be asserted under CERCLA, whether or not such claims were actually paid.

B. The Exchange between Senators Randolph and Bradley Is Consistent with the Prior Legislative History Regarding the Interpretation of Section 114(c).

The final debate in the Senate on CERCLA took place on November 24, 1980, and included the colloquy between Senators Randolph and Bradley upon which the lower court placed

such heavy reliance. However, contrary to its holding, that debate indicates that Section 114(c) preempts New Jersey's Spill Fund.

The remarks exchanged between the two Senators addressed three separate issues: (1) the effect of Section 114(c) on the ability of a State to collect taxes for a special fund for payment of claims compensable under CERCLA; (2) the issue whether temporary borrowing would be permitted from a State fund established for non-preempted purposes; and (3) the limitations, if any, upon a State's use of monies in its fund collected prior to the effective date of Section 114(c).

In the first segment of their dialogue, the Senators reaffirmed that the effect of Section 114(c) was to prohibit States from requiring contributions to special funds for items which would be eligible for compensation under Superfund. After mentioning the existence of the New Jersey Spill Fund and several other State funds, Senator Bradley inquired:

> "MR. BRADLEY . . .
>
> Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund for the purpose of reimbursing claims already provided for in this legislation?
>
> MR. RANDOLPH. Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay *damage compensable* under this bill.
>
> MR. BRADLEY. However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are *not compensable damages* as defined in this legislation.
>
> MR. RANDOLPH. The Senator is correct."[41]

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[41] 126 Cong. Rec. 30949 (1980) (emphasis added), *reprinted in* 1 Legis. Hist. at 731.

Thus, consistent with all other legislative history, both Senators recognized that state funds were preempted from imposing special taxes to pay claims which were "compensable" under CERCLA—*i.e.*, ones eligible for compensation—rather than claims which are actually paid.

In the second segment of their dialogue, the Senators attested that State funds designed to cover expenses and economic losses not covered by CERCLA, could temporarily be used to provide immediate, up-front capital for cleanup compensable by Superfund, provided reimbursement was promptly sought thereafter from the federal fund. As Senator Randolph pointed out, such an inquiry raised a question of bookkeeping rather than one of preemption.[42]

Finally, in the third segment of their dialogue, the Senators reaffirmed that Section 114(c) of Superfund was a limitation on a State's taxing power, not its spending of monies collected prior to CERCLA. Both Senators were well aware that several States with existing State funds had accumulated substantial monies in their funds prior to Superfund, and that questions would arise as to how these pre-Superfund monies could be spent in light of Section 114(c).

Senator Bradley noted that New Jersey had an existing fund.[43] At the time of the legislative debates, New Jersey had approximately $25 million accumulated in this Fund. *See* 1 Legis. Hist. at 459, 2 Legis. Hist. at 116-17. Section 114(c) places no limitation on expenditures of monies if accumulated by a State prior to the effective date of Section 114(c) or from taxes that do not violate Section 114(c). Senator Randolph made clear that these prior monies could be expended for a State's 10% share of remedial costs, expenditures for cleanup efforts not actually paid by the federal Fund or expenditures for State completion of cleanup at sites where federal efforts have been terminated:

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[42] *Id.*, *reprinted in* 1 Legis. Hist. at 732.

[43] *Id.*, *reprinted in* 1 Legis. Hist. at 731.

"MR. RANDOLPH. Mr. President, let me state categorically that there is nothing in this bill that affects the uses to which a State may put the existing cleanup fund. This bill is silent on that subject. Thus a State may, after enactment of this bill, continue to spend its existing funds for any purpose that is lawful under the State law.

If, after enactment of this bill, a State continued to pay claims from a State fund, that would not be contrary to any provision of this bill. What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill. Thus the State cannot receive a fee or a tax on a substance if that fee or tax is to go into a fund and the fund is for the purpose of paying oilspill damage claims.

Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses a State may make of its money, nor does it prohibit a State from imposing taxes or fees for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

MR. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?

MR. RANDOLPH. That is correct.

MR. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

MR. RANDOLPH. That is correct."

Id., *reprinted in* 1 Legis. Hist. at 732-33.

Unlike the initial portion of the dialogue, where Senator Bradley focused upon the purpose of State funds, in this portion he focused upon the uses of State funds, which can include monies collected prior to CERCLA or those drawn from general revenues. Even such funds are precluded by Section 114(b) from making the payments described by Senator Bradley—*i.e.*, where the "efforts . . . are in fact paid for by the federal funds." And, of course, it is true that pre-existing funds and monies drawn from general revenues are precluded neither by Section 114(b) nor Section 114(c) from paying for "efforts which are eligible for federal funds but for which there is no reimbursement," in the language of Senator Bradley.

Thus, the most reasonable and the only internally consistent interpretation to be given the above questions raised by Senator Bradley and the answers of Senator Randolph is that they addressed the extent to which Sections 114(b) and 114(c) restricted the expenditure of State funds or monies collected prior to Superfund or from taxes which did not violate Section 114(c).

In sum, the entire legislative history, including the Randolph-Bradley dialogue, leaves no doubt but that Section 114(c) was intended to prohibit the collection of special taxes for a state fund which, like that of New Jersey, has as its purpose the compensation of cleanup costs and damages which "may be compensated" under CERCLA.

CONCLUSION

The decision of the Supreme Court of New Jersey should be reversed and the case remanded for determination of the amounts due appellants by reason of the Spill Fund taxes that were unlawfully imposed on them.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Supreme Court of New Jersey correctly determined that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (also known as "Superfund"), which prohibited special State taxes only for the purpose of financing "claims which may be compensated" by Superfund, 42 *U.S.C.* § 9614(c), does not preempt the taxing provisions of the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 *et seq.*, insofar as the State Spill Fund supported by the tax is used to finance claims either not covered or not actually compensated by Superfund?

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STATEMENT OF THE CASE

In 1977 the New Jersey Legislature adopted the Spill Compensation and Control Act ("Spill Act"), *N.J.S.A.* 58:10-23.11 *et seq.*, to protect the citizens and environment of the State from damage resulting from discharges of petroleum and other hazardous substances. To finance the spill prevention and cleanup program created by the Spill Act, the Legislature imposed a tax upon major petroleum and chemical facilities. *N.J.S.A.* 58:10-23.11h; *see also N.J.S.A.* 58:10-23.11b(l) for the definition of "major facility." The tax was levied on a per barrel basis for petroleum, and on either a per barrel or percentage of fair market value basis for hazardous substances. *N.J.S.A.* 58:10-23.11h. The Spill Act provides for the revenues generated by the tax to be credited to the Spill Compensation Fund ("Spill Fund") which is authorized to finance spill response and waste site cleanup costs incurred by the Department of Environmental Protection; certain damage claims resulting from hazardous discharges;[1] the personnel and equipment costs of the Department of Environmental Protection associated with the enforcement of the Spill Act; the administrative costs of the Spill Fund; and research concerning pollution and cleanup techniques, including ocean pollution. *N.J.S.A.* 58:10-23.11o. From 1977 through 1980, the Spill Fund provided the primary source of revenue for New Jersey's petroleum spill and hazardous waste cleanup program.

[1] The types of damage claims covered by the Spill Act are set forth in *N.J.S.A.* 58:10-23.11g(a) and include: 1) damage to personal or real property; 2) damage to natural resources; 3) loss of income or earning capacity due to damage to property or natural resources; 4) loss of tax revenue by a State or local government resulting from property damage for a period not to exceed one year; and 5) interest costs on debts incurred to remedy a discharge.

At the end of 1980, however, Congress recognized that states acting alone could not adequately address the staggering problems associated with the release of hazardous substances into the environment. Consequently, Congress adopted the Comprehensive Environmental Response, Compensation and Liability Act (known as the "Superfund Act" or "CERCLA"), 42 *U.S.C.* § 9601 *et seq.*, to assist the states in financing cleanups at the most severely damaged and highest priority sites throughout the nation. Funding for this federal effort was provided by a $1.6 billion trust fund to be raised by placing a tax on crude oil petroleum, and certain chemicals,[2] and by transferring to the fund appropriations from general federal revenues. The tax was structured to provide 87.5% of the fund, while general revenues were to make up the balance. The federal tax took effect on April 1, 1981 and is scheduled to expire, if not reauthorized by Congress, on September 30, 1985. 26 *U.S.C.* § 4611 *et seq.*; 26 *U.S.C.* § 4661 *et seq.*; 42 *U.S.C.* § 9631.

Unlike the Spill Act, the Superfund Act did not cover cleanup expenses for oil spills or property damage claims of any sort. *Compare N.J.S.A.* 58:10-23.11b(k) and 42 *U.S.C.* § 9601(14); *N.J.S.A.* 58:10-23.11(g) and (o) with 42 *U.S.C.* § 9611. Nor did the federal Act provide funding

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[2] 26 *U.S.C.* § 4661 imposes a tax on 42 chemicals at specified rates. *Compare* the New Jersey tax on "hazardous substances" which reaches substances designated as "hazardous" by the Department of Environmental Protection and includes over 300 substances. *N.J.S.A.* 58:10-23.11b(k); *N.J.S.A.* 58:10-23.11h; *see also* the Environmental Emergency Response Act: Hearings on S.1480, before the Senate Committee on Finance, 96th Cong. 2d Sess., Comm. Print at 587 (1980) (testimony of Jerry F. English, Commissioner of the New Jersey Department of Environmental Protection).

for State personnel, equipment, or administrative costs.[3] Rather, the federal fund was designed to provide financing for: 1) emergency removal actions limited to $1 million or six months unless specific findings justifying continued action are made (42 *U.S.C.* § 9604(c)(1)); 2) up to 90% of the cost of remedial actions at priority sites contaminated by hazardous substances (42 *U.S.C.* § 9604(c); *see also* 42 *U.S.C.* § 9605(8)); and 3) claims by the state or federal governments for damage to natural resources (42 *U.S.C.* § 9607(f)). *See generally* 42 *U.S.C.* § 9611.[4] The federal Act specifically obligated states to pay at least 10% of all remedial actions, with the state share expanding to 50% or more for sites owned at the time of disposal by a state or one of its political subdivisions. 42 *U.S.C.* § 9604(c)(3). Moreover, the Act directed the States to assure all future maintenance of the removal and remedial actions financed by Superfund, including some—and perhaps all—of the costs for this work. *Ibid.*[5] In light of CERCLA's limitations, former Representative Eckhardt has observed that the use of the term "comprehensive" in the Act's title is a misnomer. Eckhardt, "The Unfinished Business

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[3] In fact, a proposal by Representative Stockman to create a grant program to support state hazardous waste site investigation and mitigation efforts was rejected. See 2 Library of Congress, Sen. Comm. on Environment and Public Works, 97th Cong., 2d Sess., "A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), P.L. 96-510" (hereinafter "Legis. Hist.") at 295-336.

[4] The Superfund may also be used for certain other matters, such as the compensation of claims asserted prior to CERCLA's adoption under the Clean Water Act, 33 *U.S.C.* § 1321, and the financing of epidemiologic studies. 42 *U.S.C.* § 9611.

[5] Although the State of New Jersey has argued to the United States Environmental Protection Agency ("EPA") that CERCLA requires states to contribute only 10% of operation and maintenance costs, this argument has been rejected by EPA which expects the States to finance the bulk of these costs.

of Hazardous Waste Control", 33 Baylor Law Rev. 253 (1981). The same could be said for the Act's sobriquet: "Superfund."

Perhaps the clearest example of the non-comprehensive nature of CERCLA can be found in 42 *U.S.C.* § 9605. There Congress directed the President (who in turn delegated this responsibility to EPA in Executive Order No. 12316, August 14, 1981, 46 *Fed. Reg.* 42237) to revise the National Contingency Plan ("NCP") for the removal of oil and hazardous substances to reflect and effectuate the new powers and responsibilities created by CERCLA. The NCP was to contain "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." 42 *U.S.C.* § 9605(8)(A).[6] *See also* 42 *U.S.C.* § 9605(8)(B) which mandated the compilation of a National Priority List ("NPL") containing at least 400 of the country's worst hazardous waste sites. This focus on priority releases grew directly out of the congressional recognition that the amount of money made available to Superfund would, in the words of Representative Volkmer, "cover only the tip of the iceberg as far as complete cleanup of all waste sites is concerned." 2 Legis. Hist. 265. *See also* S. Rep. No. 848, 96th Cong., 2d Sess. (1980) at 17, reprinted in 1 Legis. Hist. 324, where it was noted in reference to the then proposed six-year, $4.1 billion Superfund that such an allotment ". . . will permit government response only to the most significant releases. At this

[6] "Removal" actions are immediate, emergency cleanup actions taken on a short-term basis to prevent or mitigate damage to the public and the environment, while "remedial" actions are long-term actions "consistent with permanent remedy." 42 *U.S.C.* § 9601(23) and (24).

level of funding, response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment."

EPA has further clarified the priority system and the limited availability of Superfund money in the NCP. 40 *C.F.R.* Part 300 (1984). Removal actions will be funded only where the release or threat of a release is sufficiently acute to demand immediate response. Examples of such acute situations provided by EPA are those instances where the release or threatened release will expose the food chain to acutely toxic substances, contaminate drinking water supplies, or result in a fire or explosion. 40 *C.F.R.* § 300.65(a). *See also* 40 *C.F.R.* § 300.67 and 47 *Fed. Reg.* 31199 (1982). As to remedial actions, funding is limited to releases on the N.P.L. 40 *C.F.R.* § 300.68(a). The listing of a site does not guarantee financing, however, because "eligibility of particular actions will be decided on a case-by-case basis" since "current demands for response and expected future demands exceed available funds." 47 *Fed. Reg.* 31196 (1982). Moreover, in regard to claims for damage to natural resources, Congress itself limited the amount of money available to pay such claims to no more than 15% of the Superfund (42 *U.S.C.* § 9611(e)(2)) —an amount EPA has indicated it will not allocate for such purposes. 50 *Fed. Reg.* 9595 (1985). Indeed, the Agency did not even prepare proposed rules governing the natural resource claims process despite congressional direction to do so until New Jersey obtained an injunction mandating this relief. *New Jersey v. Ruckelshaus,* Civil Action No. 84-1668 (D.N.J. December 12, 1984); *see* 50 *Fed. Reg.* 9593 (1985). Both the structure of CERCLA and EPA's administration and implementation of the Act thus highlight the restricted nature of its coverage.

Many of the limitations contained in CERCLA were the product of a last-minute compromise forged by a group of senators during the lame duck session of the 96th Congress which convened in late November 1980. 1 Legis. Hist. VII; 1 Legis. Hist. 681 (remarks of Senator Randolph during floor debate on the compromise measure). The compromise grew primarily out of four different bills which had been considered by both houses of Congress throughout the preceding two years. On the House side, the two major proposals were H.R. 85 and H.R. 7020. As passed by the House, H.R. 85 operated prospectively to address spills of oil and hazardous substances into navigable waters, and created a fund supported by fees and general revenues to finance all government response costs and certain specific damage claims resulting from the destruction of property and natural resources. 2 Legis. Hist. 1016-1114. H.R. 7020 was limited to abandoned hazardous waste sites and proposed addressing the sites on a priority basis in cooperation with the states. 2 Legis. Hist. 391-463. The major Senate proposal was S.1480 which excluded coverage for oil spills, but otherwise addressed all kinds of releases of other hazardous substances, including spills and abandoned hazardous waste sites. 1 Legis. Hist. 462-552. S.1480 also provided compensation for certain specific property damage, natural resource damage, and medical claims incurred by victims of hazardous substance releases. The bill proposed by the Carter Administration, introduced in the Senate as S.1341, addressed spills into navigable waters of petroleum and other hazardous substances as well as abandoned hazardous waste sites. 3 Legis. Hist. 27-60.

It was in the context of the spill-oriented legislative proposals that the suggestion of preempting state taxes

levied to support state response and damage funds first arose. The genesis of the preemption provision is significant because the spill bills anticipated that the funding provided would cover all necessary costs involved in responding to future spills and in compensating the limited kinds of property damage and natural resource claims proposed for coverage. Under the major spill proposal, H.R. 85, states were preempted from levying taxes to pay for "losses" (including response costs) covered by the bill, although states were permitted to impose special taxes to finance the purchase and prepositioning of pollution clean-up and removal equipment as well as claims and damages not covered in the bill. § 110(a) and (b) of H.R. 85, reprinted at 2 Legis. Hist. 1051; § 302(a) of H.R. 85, reprinted at 2 Legis. Hist. 1074-1075; *see also* 2 Legis. Hist. 903-907 (remarks of Representatives Biaggi, Florio and Snyder). Insofar as S.1341 dealt with spills, that proposal also provided for the preemption of state taxes to finance a fund to pay compensation for losses and costs covered by the spill provisions of the bill. § 612(a) of S.1341, reprinted at 3 Legis. Hist. 57.

Preemption of state taxation to finance state spill funds covering response costs and certain damage claims was thought to be appropriate in the spill context because the federal spill program was designed to cover future spills "on an as-needed and comprehensive basis." Statement of Thomas C. Jorling, Assistant Administrator for Water and Waste Management of EPA, before the Senate Committee on Environment and Public Works, June 20, 1979, reprinted at 1 Legis. Hist. 124. Since all spills requiring response would receive it under the legislative proposals, no state funding was needed in that area. *Ibid.* Nor would state financing be necessary for the property

and natural resource claims comprehensively covered by the spill bills.

Although the proposed spill legislation affected state taxation, the preemption was admittedly narrow in scope and prevented states from imposing special taxes only to the extent that those taxes would be dedicated to duplicating elements already provided for in the federal legislation. As Representative Biaggi, the sponsor and floor manager of H.R. 85 stated, ". . . it is not the intent of H.R. 85 to preempt the States from financing by whatever means they choose those activities which are not compensable under H.R. 85." 2 Legis. Hist. 907. And, as Representative Livingston added, "This bill does not totally preempt the field; it only preempts State and local enactments which would duplicate the purpose of the funds established in H.R. 85." 2 Legis. Hist. 920. Under the proposed spill legislation, therefore, states could impose taxes to finance special funds for spill-related costs and claims not covered by the federal program.

Where abandoned sites were concerned, however, none of the major legislative proposals that pre-dated the compromise measure that became CERCLA contained tax exemption provisions. *See* H.R. 7020 as passed (2 Legis. Hist. 391-463); S.1480 as passed (1 Legis. Hist. 462-552); and S.1341 as introduced at § 612(b) (3 Legis. Hist. 57). The rationale for not preempting state taxation in this area was that the abandoned site proposals—S.1480 and part of S.1341 in particular—required state cost-sharing and provided a level of funding that, "fell far short of what would be needed to cleanup all the sites that will need some kind of remedial action in the next few years." Statement of Swep T. Davis, Associate Assistant Administrator for Water and Waste Management of EPA, recorded in

Hearings on S.1480 before the Senate Committee on Commerce, Science and Transportation, 96th Cong., 2nd Sess. (September 11-12, 1980), Comm. Print at 175. Since a comprehensive program covering all response costs was not achievable given budget constraints in the abandoned site area, preemption of state taxation was at first thought to be completely inappropriate. *Ibid. See also* Jorling Statement, 1 Legis. Hist. 124.

In the course of preparing the compromise measure, however, a provision affecting state taxation was inserted in CERCLA even though the legislation addressed abandoned sites as well as non-petroleum hazardous spills. Modeled after the preemption provisions contained in the spill proposals, the language utilized in the compromise similarly limited the preemption of state taxation to only those areas covered by the federal program:

> Except as provided in this chapter, no person may be required to contribute to any fund, *the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter.* Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase of prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State. [42 *U.S.C.* § 9614(c); emphasis added].

Given the restricted nature of CERCLA coverage—particularly as restricted in terms of response costs where coverage was not intended to be comprehensive, but to address only the worst releases of hazardous substances nationwide—the language of 42 *U.S.C.* § 9614(c) had even a narrower impact in the context of CERCLA than similar

language had had in the more comprehensive oil spill legislation. The language of 42 *U.S.C.* § 9614(c) thus allows New Jersey to continue collecting the Spill Fund tax to finance items not covered by Superfund such as oil spill response costs, property damage and loss of earnings or tax revenue claims, State administrative costs, State cost-sharing and maintenance costs under CERCLA, and remedial actions at New Jersey sites not included on the NPL. Moreover, the "may be compensated" language used in 42 *U.S.C.* § 9614(c) would also allow the State to use Spill Fund moneys to pay costs where Superfund financing proves inadequate or is not made available—*i.e.*, where State requests for removal actions are denied or limited by cost or duration under 42 *U.S.C.* § 9604(c)(1), or where federal funding for remedial actions is either not provided to a site on the NPL or is cut off prior to completion of necessary cleanup work.

The legislative history discussing the compromise language supports this interpretation. Obviously concerned about the impact of the provision on the State's Spill Fund, Senator Bill Bradley of New Jersey questioned Senator Jennings Randolph of West Virginia, a sponsor of the Superfund effort and Chairman of the Committee on Environment and Public Works which had primary responsibility for the measure in the Senate, as to the future of state taxes on industry to finance State response funds if the foregoing provision were adopted. Included in the colloquy between the two senators were the following remarks:

> MR. RANDOLPH. * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill.
>
> * * *

> MR. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?
>
> MR. RANDOLPH. That is correct.
>
> MR. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?
>
> MR. RANDOLPH. That is correct.
>
> MR. BRADLEY. Finally, if the Federal Government determines that the needs at other sites require that Federal efforts be terminated at the first site before that site is completed, may a State fund complete the effort?
>
> MR. RANDOLPH. This legislation would permit that to happen. [126 Cong. Rec. 30949 (1980), reprinted at 1 Legis. Hist. 732-733].

Given the narrow scope of the language used in 42 *U.S.C.* § 9614(c) and the guidance of the foregoing colloquy, once the Superfund Act was adopted New Jersey began to administer the Spill Act to supplement rather than to duplicate federal cleanup efforts. The State had the flexibility to adapt its program in this way because the New Jersey Legislature had vested broad discretion in the Department of Environmental Protection to select the type and extent of cleanup and related activities to be financed by the Spill Act tax. *N.J.S.A.* 58:10-23.11f. In the post-Superfund era, therefore, New Jersey has sought to maximize the infusion of federal dollars into the State for cleanup activities, and has devoted its Spill Fund to items not covered by the federal Act or to items where federal financing is unavailable.[7]

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[7] Appellants' suggestion to the contrary (Exxon brief at 25, fn.26), is both incorrect and unsupported by the record in this

(Continued on following page)

Following the adoption of the Superfund Act, however, New Jersey's right to continue the collection of the Spill Fund tax was challenged by the Exxon Corporation and four other owners of "major facilities" responsible for paying the tax (referred to collectively as "Exxon") on the sole ground that *N.J.S.A.* 58:10-23.11h was preempted by the language contained in § 114(c) of the Superfund Act, codified at 42 *U.S.C.* § 9614(c). Following an unsuccessful attempt to raise this challenge in federal court (*see Exxon Corp. v. Hunt,* 683 *F.*2d 69 (3rd Cir. 1982), *cert. denied,* 459 *U.S.* 1104 (1983)), Exxon pursued the matter through the New Jersey court system. Upon reviewing cross-motions for summary judgment on a limited record, the Tax Court of New Jersey upheld the validity of the Spill Fund tax. *Exxon Corp. v. Hunt,* 4 *N.J.* Tax 294 (1982) (reprinted in the appendix attached to Appel-

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case. Moreover, Exxon's reliance on reports prepared by the New Jersey State Auditor for fiscal years 1981 and 1982 and lodged by appellants with the Court is misplaced; those reports simply do not demonstrate, as Exxon asserts, that New Jersey has improperly used Spill Fund moneys subsequent to the adoption of 42 *U.S.C.* § 9614(c). First, the reports include fiscal year 1981 which extended from July 1, 1980 to June 30, 1981. The Superfund Act was not even in existence for almost half of this period, and the federal tax designed to support the program was not imposed until April 1981. The Superfund program was thus a nullity for most—if not all—of this period. Furthermore, the Auditor's reports do not indicate when the tax moneys expended for cleanup purposes were collected. If collected prior to the effective date of CERCLA, there would be no preemption whatsoever in regard to their use. In addition, Exxon failed to mention that the NPL was not promulgated until September 8, 1983 (48 *Fed. Reg.* 40658)—well after the alleged misspending of funds occurred. These and other items not addressed by Exxon or by the Auditor's reports (such as the accounting procedures used by the Spill Fund and the source of the federal funds obtained for cleanup purposes) demonstrate that Exxon's assertions about Spill Fund expenditures are unsupported and must be rejected as lacking in foundation.

lant Exxon's Jurisdictional Statement ("JSa") at JSa47 to JSa78). This determination was subsequently affirmed by both the Appellate Division of the Superior Court, *Exxon Corp. v. Hunt,* 190 *N.J. Super.* 131, 462 *A.*2d 1983 (App. Div. 1983) (reprinted at JSa37 to JSa46) and by the Supreme Court of New Jersey, *Exxon Corp. v. Hunt,* 97 *N.J.* 526, 481 *A.*2d 271 (1984) (reprinted as JSa15 to JSa36).

In upholding the Spill Fund tax against Exxon's challenge, the Supreme Court of New Jersey focused on the "may be compensated" language of § 114(c) and the Superfund statutory scheme which addressed priority sites to the exclusion of other problem areas. *See* 42 *U.S.C.* § 9605; 40 *C.F.R.* § 300.68. In light of the limited coverage of CERCLA, the Supreme Court of New Jersey echoed the conclusion of the Tax Court which had found that "[i]t simply strains credulity to say that hazardous waste sites and spills not meeting the [priority list] criteria are claims which 'may be compensated' under [Superfund]." 97 *N.J.* at 543 (JSa34). Based on this realistic analysis of Superfund coverage, the court below rejected Exxon's broad preemption claim and endorsed "The more logical conclusion . . . that Congress contemplated that the federal government would attempt to deal with the problems of the most seriously affected sites . . . and to allow states to maintain a compensation fund . . . to conduct their own cleanup efforts on those sites not receiving Superfund compensation and to provide for their cooperative program components including their 10% share of cleanup costs, related administrative costs for equipment and personnel, and other program features not covered by Superfund. . . ." 97 *N.J.* 543-544 (JSa35).

Dissatisfied with this result, Exxon filed a Notice of Appeal from the judgment of the Supreme Court of New

Jersey on November 19, 1984. After requesting and receiving the views of the Solicitor General as to the issues involved in this appeal, the Court noted probable jurisdiction on June 17, 1985. This brief is submitted on behalf of appellees who urge affirmance of the judgment below.

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SUMMARY OF ARGUMENT

In construing explicit preemption provisions, the Court must give effect to the will of Congress and not enlarge the preemptive scope of a federal statute beyond that intended by Congress. *Metropolitan Life Ins. Co. v. Massachusetts,* 105 *S.Ct.* 2380, 2390 (1985). Even in explicit preemption cases, therefore, there is a presumption against the complete displacement of state regulation, particularly where Congress has used statutory language effecting only limited preemption and leaving room for state action. *Ibid.*

In adopting the Superfund Act, Congress placed an extremely narrow limitation on the power of the states to impose special taxes. 42 *U.S.C.* § 9614(c). States were prohibited only from levying taxes for the purpose of compensating "claims for any costs of response or damages or claims which may be compensated under this subchapter." *Ibid.* This provision limits the preemption of state taxation to the areas covered by Congress on the federal level. Correspondingly, all areas not covered by Superfund may properly be financed by state funds supported by special taxes.

A careful analysis of CERCLA reveals that the availability of Superfund financing is restricted to priority sites or releases of national significance. 42 *U.S.C.* § 9605 (8); 40 *C.F.R.* § 300.68(a). Moreover, no federal compensation whatsoever is provided for petroleum spills or nongovernmental third party damage claims. 42 *U.S.C.* § 9601(14); 42 *U.S.C.* § 9611. This narrow federal coverage thus leaves many areas open for financing on the state level through special taxes.

The tax levied under the New Jersey Spill Act may consequently be used to fund all authorized state costs excluded from federal coverage. *Compare N.J.S.A.* 58:10-23.11(g) and (o) with 42 *U.S.C.* § 9611. Authorized state costs ineligible for federal financing include expenditures incurred in responding to petroleum spills, the administrative expenses incurred in implementing the Spill Act by the Spill Fund and the Department of Environmental Protection, and equipment and personnel costs. In addition, the Spill Fund may be used for the payment of damage claims, including claims for damage to property, loss of earnings, and loss of tax revenues. *Compare N.J.S.A.* 58:10-23.11(g) and (o) with 42 *U.S.C.* § 9611. Moreover, the State tax may also be used to finance the 10% or greater state share required for federal action under CERCLA, 42 *U.S.C.* § 9604(c), because such an expense is statutorily ineligible for federal compensation. Likewise, special state taxes may be used to provide maintenance costs incurred by the states at Superfund sites. *See* 42 *U.S.C.* § 9604(c)(3). These areas alone support the validity of the Spill Fund tax.

State taxes may also be used to supplement federal response efforts, however, because the "may be compensated" formulation limits federal preemption to instances where there is some likelihood or probability of Superfund financing. Where federal regulations establish criteria that must be met to qualify for Superfund compensation, sites failing to meet these standards are not eli-

gible for federal funding and thus fall outside of the preemptive scope of 42 *U.S.C.* § 9614(c). Moreover, where EPA rejects State requests for Superfund financing, such rejections are tantamount to declarations of ineligibility. Special state taxes may thus be used to support all such work not actually compensated by Superfund. State taxation is limited, therefore, only for the purpose of financing costs that are realistically eligible for federal funding.

This construction is amply supported by the legislative history. All of the precursors to 42 *U.S.C.* § 9614(c) similarly limited the preemption of state taxation only to those areas covered on the federal level. *See, e.g.,* § 110(a) of H.R. 85, reprinted at 2 Legis. Hist. 1051; remarks of Representatives Biaggi, Florio, and Snyder, reprinted at 2 Legis. Hist. 903-907. States were thus free to use special state taxes to supplement—albeit not to duplicate—federal coverage. This narrow scope of preemption was carried over into 42 *U.S.C.* § 9614(c), as demonstrated conclusively by the remarks of Senators Randolph and Bradley. According to the colloquy between these two senators, states may levy special taxes "to cover expenses and economic loss not covered under the provisions of this bill . . ." 1 Legis. Hist. 732. This interpretation has recently been confirmed in both the Senate and the House where committees dealing with proposed Superfund reauthorization legislation have attempted to dispel "any cloud of uncertainty over the legitimacy" of continued state taxation under 42 *U.S.C.* § 9614(c). *See* Superfund Amendments of 1984, Sen. Rep. No. 98-631, 98th Cong., 2nd Sess. (September 21, 1984), Comm. Print at 35-36; Superfund Expansion and Protection Act of 1984, H. Rep. No. 98-890, Part 1, 98th Cong., 2nd Sess. (July 15, 1984), Comm. Print at 58-59. Both of these reports reaffirm the

construction of 42 *U.S.C.* § 9614(c) provided in the Bradley/Randolph colloquy.

The intent of Congress was thus fulfilled by the Supreme Court of New Jersey when it upheld the Spill Fund tax. As a result, this Court should affirm the judgment below.

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ARGUMENT

POINT I

THE LANGUAGE OF 42 U.S.C. §9614(c) AND THE STRUCTURE OF THE SUPERFUND ACT CONTEMPLATE CONTINUED STATE TAXATION TO FINANCE STATE HAZARDOUS WASTE PROGRAM COSTS EITHER NOT COVERED OR NOT ACTUALLY COMPENSATED BY SUPERFUND.

The primary thrust of preemption analysis is to determine the intent of Congress in enacting the federal statute in issue. *Shaw v. Delta Air Lines, Inc.,* 463 *U.S.* 85, 95 (1983); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta,* 458 *U.S.* 141, 152 (1982). For until that intent is ascertained, it is impossible to decide whether the state enactment "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and thus must be invalidated under the Supremacy Clause. *Jones v. Rath Packing Co.,* 430 *U.S.* 519, 526 (1977), quoting *Hines v. Davidowitz,* 312 *U.S.* 52, 67 (1941).

In reviewing a preemption challenge, however, state legislation is presumed valid and preemption is disfavored, to be found only in the clearest cases of conflict. *Maryland v. Louisiana,* 451 *U.S.* 725, 746-747 (1981). This rule applies even in "explicit" preemption cases such as the

instant matter where the scope of preemption contained in a particular congressional enactment is in question. The Court recently affirmed this principle in *Metropolitan Life Ins. Co. v. Massachusetts,* 105 S.Ct. 2380, 2390 (1985), when it upheld a Massachusetts statute because the state legislation fell outside of the explicit preemption language contained in the federal Employee Retirement Income Security Act of 1974 ("ERISA"). Even in cases involving express preemption clauses, therefore, "[t]he presumption is against pre-emption," and the Court is "not inclined to read limitations into federal statutes in order to enlarge their preemptive scope." *Ibid.*

Preemption analysis generally follows a two-tiered format. First, a court will ascertain the scope and meaning of the two statutes in question; secondly, a court will determine whether the State enactment necessarily conflicts with its federal counterpart, or can coexist with it without impeding the federal objective. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 *U.S.* 311, 317 (1981). Such an inquiry is not restricted to analyzing the statutory language alone, but requires a court "to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co., supra,* 430 *U.S.* at 526. In comparing the operation and effect of state and federal enactments, particularly where federal preemption is explicitly narrow and partial in scope, it is important to keep in mind that, "Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field . . . is not forbidden or displaced." *Kelly v. State of Washington,* 302 *U.S.* 1, 10 (1937). *See also Askew v. American Waterways Operators, Inc.,* 411 *U.S.* 325, 332 (1973).

Nothing in *Aloha Airlines, Inc. v. Director of Taxation,* 464 *U.S.* 7 (1983), requires deviation in this case from either the presumption against preemption or the two-tiered method of analysis previously followed by this Court and used below by the Supreme Court of New Jersey. For in *Aloha Airlines* the Court indicated that where an express preemption provision clearly and unambiguously forbids precisely the kind of state action under attack, the state statute can be invalidated without further recourse to legislative history or rules developed in cases where the scope of federal preemption is much less clear. *Ibid.* at 12. Since the explicit preemption language in issue here differs from that involved in *Aloha Airlines* in that 42 *U.S.C.* §9614(c) does not categorically prevent all state taxation of a particular category, but rather is much more circumscribed in nature, the truncated review that proved sufficient in *Aloha Airlines* is inappropriate in this context.[8]

As in all cases involving explicit preemption clauses where the task before the Court is one of statutory con-

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[8] *Compare* 49 *U.S.C.* § 1513(a) which provides that, "No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . ." with the language of 42 *U.S.C.* § 9614(c) which provides that, "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims *which may be compensated under this subchapter.*" (Emphasis added). The italicized language of 42 *U.S.C.* § 9614(c) limits the preemptive scope of the provision and compels resort to the rest of the Superfund Act to determine the extent of federal coverage and—derivatively—the extent of federal preemption. In such circumstances where Congress has consciously chosen narrowing language to limit the scope of preemption, and a traditional function of state government (*i.e., taxation*) is at stake, the presumption against preemption is particularly strong. *See Metropolitan Life Ins. Co. v. Massachusetts, supra,* 105 *S.Ct.* at 2389-2390.

struction, the starting point for analysis is the language of the federal statute. *See Metropolitan Life Ins. Co. v. Massachusetts, supra,* 105 *S.Ct.* at 2386-2389; *Shaw v. Delta Air Lines, Inc., supra,* 463 *U.S.* at 95. At issue here is the following language contained in 42 *U.S.C.* § 9614(c):

> **Except as provided in this Act, no person may be required to contribute to any Fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter.**

This provision, by its own terms, restricts state taxation if the purpose of the tax is to finance a fund used to pay claims "which may be compensated under this subchapter." Although not a paragon of legislative drafting, this language limits the preemption of state taxation to the areas Congress decided to cover on the federal level. A corollary of this limitation is that Congress thus left to the states the power to tax industry for claims excluded from coverage by Superfund. For, when Congress circumscribes its coverage in this manner, "state regulation outside that limited field . . . is not forbidden or displaced." *Kelly v. State of Washington, supra,* 302 *U.S.* at 10; *see also Shaw v. Delta Air Lines, Inc., supra,* 463 *U.S.* at 97fn. 17. (state anti-discrimination employment law preempted only insofar as it related to pension plans covered by ERISA and thus continued to apply to other aspects of the employment relationship such as hiring, promotions and salaries).

As noted above, Superfund provides limited financing for certain removal actions involving acute toxicity (42 *U.S.C.* § 9604(c)(1); 40 *C.F.R.* 300.65), for remedial actions at sites on the NPL (40 C.F.R § 300.68(a)), and for claims brought by the state or federal governments for damage to natural resources (42 *U.S.C.* § 9607(f)). 42 *U.S.C.* § 9611. No federal financing in any of these areas is provided for petroleum releases, however. 42 *U.S.C.* § 9601(14). CERCLA thus leaves completely untouched many categories of expenditures covered by Spill Fund. These categories include the cost of remedying petroleum spills; the payment of damage claims, including claims for damage to property, loss of earnings, and loss of tax revenues; and nongovernmental claims for damage to natural resources. *Compare* 42 *U.S.C.* § 9611 with *N.J.S.A.* 58:10-23.11g(a). Moreover, the Spill Fund also finances other costs excluded from federal coverage such as personnel and equipment costs incurred by the Department of Environmental Protection in operating the State response program, and the administrative costs of the Spill Fund. Although Exxon has referred to these purposes of the Spill Fund as "incidental" (Exxon brief at 22-23, fn. 24), New Jersey rejects this characterization as inconsistent with the State statutory scheme. Petroleum spills in particular are an integral part of the coverage provided by Spill Fund,[9] as are administrative expenses which support the operation of both the Spill Fund and the Department of Environmental Protection's hazardous site cleanup program.

CERCLA also specifically requires states to provide at least 10% of the cost of remedial actions. 42 *U.S.C.* § 9604(c). Since these costs are not eligible for Super-

[9] The Spill Act placed special emphasis on providing a fund to address petroleum spills because of the fear that such a spill would seriously damage the waters and beaches of the New Jersey shore, thus interfering with the State's lucrative tourist industry. *N.J.S.A.* 58:10-23.11a. That New Jersey has not suffered a catastrophic oil spill since the Spill Act was adopted neither renders this purpose of the Act "incidental," nor removes the need to collect taxes to provide a contingency fund for use in the event of a serious petroleum spill. The tax court noted this important fact in its opinion upholding the Spill Fund tax (JSa75).

fund financing, a state may levy its own tax to fund these expenditures.[10] Furthermore, since the Spill Act in *N.J.S.A.* 58:10-23.11f vests the Department of Environmental Protection with discretion in financing cleanup actions, this flexible grant of authority allows the Department to use Spill Fund moneys to provide New Jersey's cost share under CERCLA. Any doubt that may have existed concerning this use of the Spill Fund was removed by the New Jersey Legislature when it adopted the Hazardous Discharge Bond Act, *P.L.*, 1981, *c.* 275. This Act provided for the sale of bonds to finance a fund supplementary to Spill Fund, and authorized the use of money obtained under the Act to pay the non-federal share of any federal cleanup program "if moneys available pursuant to *P.L.* 1976, *c.* 141 [Spill Act] are currently insufficient to cover the share." *Ibid.* at § 15. Since New Jersey currently has 85 sites on the NPL and 12 more have been proposed for addition to the list, the State share of the cost of remedial actions has been a significant expense of the Spill Fund, and is expected to constitute a significant expenditure in the future if Superfund is reauthorized. Moreover, as remedial and removal actions are concluded at New Jersey sites, it is anticipated that the costs of maintaining these sites will become a significant non-federal cost of the State's hazardous waste cleanup program.

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[10] Interestingly, Dr. Louis Fernandez, Vice Chairman of Monsanto Company, a party to this litigation, submitted a statement on behalf of the Chemical Manufacturers Association to the Senate Committee on Finance during the Committee's hearings on S.1480—a statement that supported preemption "except to the extent used to raise money for matching purposes under this legislation." Hearings on S.1480 before the Committee on Finance, United States Senate, 96th Cong., 2d Sess; September 11-12, 1980, Comm. Print at 209. Appellants' position in this case, however, does not recognize the state share of the cost of remedial actions as a legitimate object of state taxation.

The plain language of 42 *U.S.C.* § 9614(c) thus permits states to impose taxes to finance all of the elements of state hazardous waste programs not covered by Superfund. Under the New Jersey Spill Act, therefore, the State may continue to levy its tax on petroleum and hazardous substances to finance a whole host of items, including State response to petroleum spills; administrative, personnel, and equipment costs incurred by the Spill Fund and the Department of Environmental Protection; property damage claims; the New Jersey share of the cost of Superfund remedial actions; and State maintenance costs at Superfund sites.

While the areas of Spill Fund spending that fall beyond the scope of federal coverage would alone sustain the validity of the New Jersey tax, the language used by Congress in 42 *U.S.C.* § 9614(c)—when analyzed against limitations in Superfund coverage imposed by EPA—allows the states to supplement federal cleanup efforts by financing costs not actually compensated by Superfund. This is so because the "may be compensated" formulation limits federal preemption to instances where there is some likelihood or probability of Superfund financing. *See Webster's Third New International Dictionary* (1976) at 1396, which defines "may" as "in some degree likely to"; *see also Black's Law Dictionary* (5th ed. 1979) at 883, which defines "may" as "an auxiliary verb qualifying the meaning of another verb by expressing . . . possibility [or] probability . . ." Where federal regulations establish criteria that must be met to qualify for Superfund financing, therefore, sites that fail to meet these standards are not eligible for federal funding and thus fall outside of the preemptive scope of 42 *U.S.C.* § 9614(c).

Perhaps the clearest example of this point involves federal funding for remedial actions where the NCP pro-

vides that Superfund financing will be made available only to sites on the NPL. 40 *C.F.R.* § 300.68(a). Remedial actions at New Jersey sites not included on the NPL could thus be financed by the Spill Fund since there is no reasonable likelihood under the federal program that such sites would receive Superfund financing. State funding of remedial actions at non-NPL sites would be used to clean up problem areas of local—but not national—significance. A similar analysis applies to removal actions that fail to qualify under the "acute toxicity" test established by EPA in the NCP as a prerequisite to federal funding. 40 *C.F.R.* § 300.65. As noted above, EPA's implementation of the Superfund program is relevant to the issue of preemption because courts must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co., supra,* 430 *U.S.* at 526.

In addition, where EPA rejects state requests for Superfund financing for emergency removal actions, for remedial actions at NPL sites,[11] or for damage to natural resources, such rejections effectively foreclose the possibility of federal financing for the requested action. Since a rejection is tantamount to a declaration of ineligibility for federal financing, State funds should be permitted to finance all work for which a rejection is received. *See* the introduction to the NCP, 47 *Fed. Reg.* 31195 to 31196,

[11] EPA has indicated that inclusion on the NPL is merely the first step in qualifying for Superfund-financed remedial action; it is not a guarantee that compensation will be provided. For, as EPA has stated, "If a release is included on the NPL but a later remedial investigation discloses the hazard to be less significant than originally thought to be, a decision may be made not to provide Fund financed remedial response." 47 *Fed. Reg.* 31187 (1982). *See also* 48 *Fed. Reg.* 40659 (1983) ("Inclusion of a site on the NPL does not establish that EPA necessarily will undertake response actions.").

where EPA noted that "eligibility" for Superfund financing will be decided on a case-by-case basis since insufficient funding was available to support all sites in need of cleanup.

The use by Congress of the "may be compensated" language is particularly telling in this regard. Congress selected this formulation over "may be asserted" which would have prevented the use of state taxes to finance any claim which could conceivably have been brought under Superfund, regardless of its chances for eventual financing.[12] By utilizing "may be compensated" instead, however, Congress limited preemption to those areas where there was a realistic chance of federal financing. Once that opportunity is foreclosed and ineligibility established for any specific action, though, the "may be compensated" formulation allows state funds to pick up the slack. It was precisely this situation that the Supreme Court of New Jersey addressed when it found that the Spill Fund could be used to finance hazardous waste cleanup costs and related claims "not actually paid under Superfund." (JSa36).

This "actual compensation" test, however, presupposes that states will request Superfund financing whenever a site or release falls reasonably within the criteria used to establish NPL ranking for remedial actions, or within the acute toxicity criteria used to determine federal funding for removal actions. To the extent that New Jersey sites remain realistically eligible for federal financing, therefore, Spill Fund revenues could not be used to support independent, state-sponsored cleanup efforts at

[12] The "may be asserted" formulation was proposed by Senator Cannon in Amend. No. 2387 to S.1480, reprinted at 3 Legis. Hist. 185-186. *See also* § 110 of H.R. 85, reprinted at 2 Legis. Hist. 1051.

those sites. This, then, is the real thrust of 42 *U.S.C.* § 9614(c)—to channel the states into the Superfund program for acutely hazardous and national priority sites. Congress thus used 42 *U.S.C.* § 9614(c) to promote national uniformity in responding to priority sites—at least to the extent that federal financing would be made available to support such a program. States that want to maintain their own funds supported by special taxes must thus maximize their participation in the Superfund program and cannot use their funds to circumvent federal regulatory requirements or other entanglements regarding sites realistically eligible for federal financing.[13] Should a state want to embark upon such an independent program, however, it would be required to finance it through general revenues, as allowed by the second sentence of 42 *U.S.C.* § 9614(c) ("Nothing in this section shall preclude any State from using general revenues for such a fund. . . .").

The actual compensation test thus encompasses the concept of compensability because it restricts the use of state taxes to finance costs realistically eligible for Superfund financing unless and until a determination of ineligibility is made. Although the "may" in "may be compensated" could conceivably be interpreted as "shall" (*see Webster's Third New International Dictionary* (1976) at 1396 which notes that "may" often means "shall" when used in statutes; *see also Black's Law Dictionary* (5th ed.

[13] Just such a situation occurred in New Jersey when the State wanted to deviate from EPA's policy of allowing potentially responsible parties to conduct the remedial investigation/feasibility study ("RI/FS"; *see* 40 *C.F.R.* § 300.68(d)) at an NPL site. In order to ensure governmental as opposed to private party control of the RI/FS process, New Jersey withdrew its request for Superfund financing. Because it appeared that the cost of the study realistically could have been financed under the federal program, the Attorney General's Office advised the Spill Fund not to pay for the RI/FS. General revenues were used instead.

1979) at 883 which notes that "may" and "shall" are frequently used interchangeably, and advises that the meaning of "may" should be sought in its context rather than through resort to grammar), it need not be given anything other than its common meaning of "likely to" to support the validity of the Spill Fund tax and the judgment to this effect rendered below.

Although Exxon argues that the "actual compensation" test makes 42 *U.S.C.* § 9614(b) and (c) impermissibly redundant, this is not the case.[14] For 42 *U.S.C.* § 9614(b) prevents double recoveries for the same claims no matter what the source of compensation, and does not refer solely to governmental funds. If a person—including a state government—were to obtain complete compensation for response costs from a responsible party through a state court common law nuisance action, for example, this section would prevent a duplicate recovery under Superfund. By prohibiting double recoveries categorically regardless of source, 42 *U.S.C.* § 9614(b) fosters the conservation of limited financial resources available for compensating claims, protects the subrogation rights of the Superfund, and promotes the early election of remedies by claimants. In no way can it be deemed to be redundant of 42 *U.S.C.* § 9614(c) which addresses entirely different concerns related to state taxation, as noted above.

[14] 42 *U.S.C.* § 9614(b) provides in full that:

> Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

In conclusion, the preemptive scope of 42 *U.S.C.* § 9614(c) is limited by its own terms and the structure of the Act and its implementing regulations to those costs covered or actually compensated by the Superfund. Consequently, the decision of the Supreme Court of New Jersey should be affirmed.

POINT II

THE LEGISLATIVE HISTORY OF THE SUPERFUND ACT SUPPORTS NEW JERSEY'S INTERPRETATION OF 42 U.S.C. § 9614(c).

In interpreting statutes, the duty of the Court is to enforce the will of Congress. *Chemical Mfrs. Ass'n v. Natural Res. Defense Council,* 105 *S.Ct.* 1102, 1108 (1985). Although the Court starts the process of statutory construction with the language of the statute, its analysis does not necessarily end there. Rather, the Court also considers the object and policy of the statute as well as its legislative history. *Stafford v. Briggs,* 444 *U.S.* 527, 536-537 (1980). Indeed, all materials relevant to determining legislative intent should be reviewed. *Watt v. Alaska,* 451 *U.S.* 259, 265-266 (1981); *Andrus v. Shell Oil Co.,* 446 *U.S.* 657, 666 fn.8 (1980). For, as Chief Justice Marshall declared in the early days of this Court, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *Ibid.,* citing *United States v. Fisher,* 2 Cranch 358, 386, 2 *L.Ed.* 304 (1805). *See also* Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. Law Rev. 527, 541 (1947). To understand the scope and meaning of 42 *U.S.C.* § 9614 (c), therefore, resort to the legislative history of the provision is necessary. Indeed, the evolution of the provision may be the best available guide to legislative intent. *See generally Chemical Mfrs. Ass'n v. Natural Res. Defense*

Council, supra, 105 *S.Ct.* at 1108; *Russello v. United States,* 464 *U.S.* 16, 23 (1983).

The Superfund Act was adopted in the waning hours of the 96th Congress to provide a "first step to respond to the severe threats posed by spills, leaks and releases of hazardous substances, as well as toxic dumpsites." 1 Legis. Hist. 711 (remarks of Senator Mitchell). The road to passage, however, "was neither easy nor direct." 1 Legis. Hist. V (preface to legislative history of Superfund prepared by the Congressional Research Service). Indeed, the Act was an eleventh hour compromise forged primarily in the Senate on the basis of four predecessor bills: H.R. 85 which addressed spills into navigable waters of oil and hazardous substances; H.R. 7020 which was confined to abandoned hazardous waste sites; S. 1480 which addressed all releases of nonpetroleum hazardous substances (including spills and abandoned sites) and provided for victim compensation; and S. 1341 which was proposed by the Carter Administration and combined coverage in one bill for oil and hazardous substance spills as well as abandoned sites. *See generally,* 1 Legis. Hist. V-VII; 1 Legis. Hist. 681-773 (Senate debate); 1 Legis. Hist. 774-775 (letter transmitting the compromise measure from the Senate to the House).

Despite the rushed and somewhat confusing circumstances surrounding the enactment of CERCLA, the evolution of the provision concerning state taxation can be charted through the 96th Congress. The preemption of state taxation and states response programs became a central issue during consideration by the House of H.R. 85, the oilspill bill that eventually was broadened to include spills of hazardous substances. *Compare* H.R. 85 as introduced on January 15, 1979 (2 Legis. Hist. 474-524) with H.R. 85 as passed by the House on September 19,

1980 (2 Legis. Hist. 1016-1114). In H.R. 85, the House proposed a national, comprehensive scheme of liability and compensation to address pollution caused by spills of oil and hazardous substances into navigable waters. The bill was intended to provide a uniform federal program to replace the existing "patchwork quilt" of federal and state laws in the area. 2 Legis. Hist. 527 (H. Rep. No. 96-172, part 1). The bill imposed strict liability on the persons responsible for spills (§ 104, reprinted at 2 Legis. Hist. 1028-1033),[15] and also required vessels and other entities involved in the transportation and handling of oil and hazardous substances to obtain insurance to cover damages and response costs resulting from spills (§ 105, reprinted at 2 Legis. Hist. 1034-1037). To provide compensation in those situations where a party responsible for a spill was either unknown or incapable of financing the costs of response and damages, however, H.R. 85 proposed the creation of a fund supported in large part by fees on oil and certain chemicals (Title V, reprinted at 2 Legis. Hist. 1093-1104). Although some concern was expressed about the impact of the fees on industry, no adverse effect was anticipated. Indeed, the anticipated impact of the fees was described as "minimal." 2 Legis. Hist. 567 (H. Rep. No. 96-172, part 1).

H.R. 85 made the fund "liable, without any limitation, for all damages which are compensable damages under title V of this Act, to the extent that the loss is not otherwise compensated." § 104(f)(1), reprinted at 2 Legis. Hist. 1031. "Compensable damages," in turn, were defined as "damages asserted for":

[15] Citations are to the oilspill portion of H.R. 85; parallel provisions can be found relating to hazardous substance spills in Title III, reprinted at 2 Legis. Hist. 1061-1090.

(A) removal costs,
(B) injury to, or destruction of, real or personal property,
(C) injury to, or destruction of, natural resources, and
(D) loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources [subject to certain conditions]. [§ 531, reprinted at 2 Legis. Hist. 1104].

This definition excluded damages which had been covered in earlier versions of the bill, including the loss of use of property or natural resources, and the loss of tax revenue for a period of one year due to property damage. *Compare* H.R. 85 as passed with § 103(a) of H.R. 85 as introduced, reprinted at 2 Legis. Hist. 487.

Against the backdrop of the coverage provided in the final version of H.R. 85, the House proposed the following preemption language:

> Sec. 110.(a) Except as provided in this title—
>
> (1) no action may be brought in any court of the United States, or of any State or political subdivision thereof, for damages for an economic loss described in section 103(a), a claim for which may be asserted under this title, and
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> (2) *no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a compensable damage under title V,* nor to establish or maintain evidence of financial responsibility relating to the satisfaction of a claim for such a loss [reprinted at 2 Legis. Hist. 1051; emphasis added].

H.R. 85 went on to provide, however, that "Nothing in subsection (a) shall preclude any State from imposing a tax or fee upon any person or upon oil in order to finance the purchase and prepositioning of oil pollution cleanup

and removal equipment." § 110(b), reprinted at 2 Legis. Hist. 1051. *See also* § 302(a) of H.R. 85 which imposes substantially similar requirements in regard to hazardous substance spills (2 Legis. Hist. 1074-1075).

The preemption provisions of H.R. 85 sparked a considerable amount of concern and comment in the House. During the course of debate on the measure, Representative Biaggi—the floor manager of the bill—noted the growing concern about the continuing existence of State funds and stated that, "What H.R. 85 does is to prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for an oil spill damage claim as defined in title V of the bill." 2 Legis. Hist. 903. This statement led to a colloquy between Representative Biaggi and Representative Florio from New Jersey who was concerned about the impact of the provision on New Jersey's Spill Fund:

> Mr. Florio . . . Am I correct in understanding that it is the purpose of section 110 to prohibit States from requiring any person to contribute to a fund for the purpose of reimbursing claims as described in title V?
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> Mr. Biaggi. Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay damage compensable under H.R. 85.
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> Mr. Florio. However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with spills and discharges of oils and hazardous substances that are not compensable damages as defined in this legislation or that do not occur in or threaten the navigable waters of the United States.
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> Mr. Biaggi. The gentleman is correct. [2 Legis. Hist. 904].

The colloquy went on to establish that H.R. 85 would not prevent states from levying taxes "to finance a State fund

designed to cover expenses and economic loss not covered under the provisions of H.R. 85," or from using such taxes "to provide intermediate, up front capital to pay for [response] activities and seek reimbursement from the Fund established under H.R. 85." *Ibid.* Moreover, the colloquy stated that there would be no preemption whatsoever in regard to the use of state taxes collected prior to the effective date of H.R. 85. 2 Legis. Hist. 905.

The meaning of the preemption provisions was further clarified in the following colloquy between Representatives Biaggi and Snyder:

> Mr. Snyder. Further with respect to the existing State fund, will it be permissible for the State of New Hampshire to maintain that fund and continue raising revenues for that fund and any purposes other than those covered by H.R. 85? Specifically, I refer to maintenance of a State staff as well as the purpose of prepositioning of equipment and materials for cleanup.
>
> Mr. Biaggi. The preemption provision in H.R. 85 would not prohibit the maintenance and operation of such a fund as the gentleman mentions for the purposes he cites.
>
> Mr. Snyder. In fact, cannot the State fund and the revenue system supporting it be maintained and used for any purpose, including compensation of damages, and cleanup for which the fund created by H.R. 85 is not available?
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> Mr. Biaggi. Again, I would say to the gentleman that it is not the intent of H.R. 85 to preempt the States from financing by whatever means they choose those activities which are not compensable under H.R. 85. [2 Legis. Hist. 906-907].

See also the remarks of Representative Livingston to the same effect at 2 Legis. Hist. 919-920.

Both colloquies echo the analysis of the preemption provision contained in an earlier House report on H.R. 85

which noted that, "The States would be prohibited only from duplicating the basic purposes of the Federal fund . . .," 2 Legis. Hist. 532 (H. Rep. No. 96-172, part 1). Moreover, in regard to the language assuring states that they could tax to finance the purchase and installation of pollution abatement equipment, the report stated that, "by singling out this particular State activity as not covered under the preemption subsection, neither the Subcommittee nor the Committee implies or intends to imply that other State actions, not specifically enumerated, are prohibited." 2 Legis. Hist. 533. *See also* 2 Legis. Hist. 562-563 (H. Rep. No. 96-172, part 1).

From all of the above comments, it is clear that the preemption provisions in H.R. 85 were intended merely to prevent the states from duplicating what was envisioned to be a comprehensive federal spill fund—comprehensive, that is, within the scope of its coverage. The House recognized, however, that even the program it envisioned in H.R. 85 would not address all of the kinds of damage resulting from spills, and thus contemplated that States would levy taxes to cover areas excluded from the proposed federal scheme. Moreover, although the House specifically included a disclaimer in the preemption sections of H.R. 85 allowing states to impose taxes for the purchase and positioning of pollution abatement equipment, this provision was intended to be illustrative of the acceptable uses of a state tax, and was not the only purpose for which a State tax was authorized.

Since a combination of the liability, insurance, and funding provisions of H.R. 85 was expected to accommodate all future spills in terms of response costs and the specified damages, there appeared to be no need for coextensive state programs. This point was emphasized

during consideration of S. 1341, the bill proposed by the Carter Administration, which also contained a spill program analogous to the coverage provided in H.R. 85. (3 Legis. Hist. 27-60). Under the spill provisions of S. 1341, according to Thomas C. Jorling, Assistant Administrator, Water and Waste Management, EPA, "all spills requiring response would receive it, each spill would be completely cleaned up, and any property damages and limited economic damages . . . would be compensated. For these activities, then, no State authority or funds would be needed."[16] 1 Legis. Hist. 124 (written statement of Mr. Jorling submitted to the Subcommittee on Environmental Pollution and Resource Protection, Committee on Environment and Public Works). Mr. Jorling also noted, however, that the spill portions of S. 1341 would preempt a state from establishing a fund "which would duplicate the purposes of the legislation but it does not preempt States for other purposes." 1 Legis. Hist. 112. His views are thus consistent with those of Representatives Biaggi, Florio, and Snyder noted above. *See also* Statement of Swep T. Davis, Associate Assistant Administrator for Water and Waste Management of EPA, recorded in Hearings on S. 1480 before the Senate Committee on Commerce, Science and Transportation, 96th Cong. 2nd Sess. (September 11-12, 1980), Comm. Print at 175.

In contrast to the spill-related preemption provision of S. 1341, another section of that bill expressly narrowed the scope of the spill provision and also disavowed any

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[16] The preemption provision of S. 1341 was contained in § 612 and used language similar to that included in H.R. 85. S. 1341 provided in pertinent part that, "no person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss or cost [described in subsection (a) of section 607 of this title] . . . 3 Legis. Hist. 57.

preemptive intent in regard to abandoned hazardous waste sites:

> Nothing in subsection (a) of this section shall preclude or be interpreted to preempt any State from establishing liability funds, establishing limits of liability, setting financial responsibility requirements, or imposing any taxes or fees upon any person, or upon oil or hazardous substances for the purpose of establishing liability and compensation schemes for losses or costs not compensated under this title which are associated with pollution, or for any losses or costs associated with releases of hazardous substances as defined in section 601(o)(3) at uncontrolled hazardous waste disposal sites. [§ 612(b), reprinted at 3 Legis. Hist. 57].

No preemption was proposed for abandoned sites because "The legislation focuses Federal assistance on those sites presenting the most serious public health, safety or environmental problems: the States would have the responsiiblity for remedying the problems caused by the vast majority of the remaining inactive and abandoned sites." Jorling Statement, *supra,* 1 Legis. Hist. 109-110. Due to the limitations of the federal program for abandoned sites, therefore, "the Administration felt that preemption would neither be equitable nor in the best interests of public health and environmental protection." *Ibid.* at 124. *See also* Davis comments, *supra,* Comm. Print at 175 (no preemption in regard to state taxation to remedy abandoned sites because "we need that State program as a complement to this program.")

Congress at first agreed with the Administration that there should be no preemption of state taxation in the abandoned site area. Neither H.R. 7020 nor S. 1480 which both addressed the abandoned site problem contained any restriction on state taxation. *See* H.R. 7020 as passed by the House, 2 Legis. Hist. 391-463; S. 1480 as reported, 1

Legis. Hist. 462-552. In August 1980, however, two amendments containing preemption provisions were proposed for addition to S. 1480—one by Senator Magnuson and the other by Senator Gravel. Both of these amendments proposed adding an oilspill title to S. 1480 and limited preemption to the oilspill context. They thus were consistent in concept with the approach taken earlier by Congress and the Administration which preempted state taxation to the extent of federal coverage in the oilspill area, but rejected preemption in regard to abandoned sites.[17]

On September 24, 1980, however, Senator Cannon proposed a number of amendments to S. 1480 reflecting concerns raised in hearings before the Commerce Committee. 3 Legis. Hist. 178-179. *See also* Hearings on S. 1480 before the Senate Committee on Commerce, Science and Transportation, 96th Cong., 2nd Sess. (September 11-12, 1980), Comm. Print. Due to the extremely tight timeframe, the amendments had not been considered in committee session. 3 Legis. Hist. 178. Senator Cannon, on behalf of the Commerce Committee, thus invited comments on the amendments. *Ibid.* Included in the group of 15 amendments was No. 2387 which proposed some limitations on state taxation:

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[17] The Magnuson Amendment (No. 1958) is reprinted at 3 Legis. Hist. 70-113. In regard to preemption, § 15(a) of the amendment provided in pertinent part that, "No person may be required to contribute to any fund, by any Federal, State, or other law, the purpose of which is to pay compensation for any loss which may be compensated under this title." *Ibid* at 107. The Gravel Amendment (No. 1965) is reprinted at 3 Legis. Hist. 114-150. Its preemption provision was sweeping in scope, stating that "States are hereby precluded from: 1) the imposition of excise taxes or fees upon oil for purposes of financing activities *related to* the cleanup of discharges and the payment of damages caused by discharges." *Ibid.* at 142 (emphasis added).

Sec. 8(a) Except as provided in this Act and subject to the provisions of subsection (b) of this section—

(1) No action may be brought in any court of the United States, or of any State or political subdivision thereof, for costs or damages for which a claim may be asserted under this Act, and

(2) No person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for such costs or damages, nor to establish or maintain financial responsibility relating to the satisfaction of a claim for such costs or damages: provided, however, that nothing in this subsection shall preclude any State from imposing a tax or fee upon any person or upon any hazardous substance in order to finance the purchase or pre-positioning of hazardous substance release cleanup equipment or other preparations for the cleanup of a release of hazardous substances which affects such State.

(b) Nothing in subsection (a) shall preclude or be interpreted to preempt any State from establishing liability funds establishing limits of liability, setting financial responsibility requirements, or imposing any taxes upon any person, or upon oil or hazardous substances for the purpose of establishing liability and compensation schemes for losses and costs associated with releases of hazardous substances at any closed hazardous waste disposal facility. [3 Legis. Hist. 185-186].

Although the precise impact of this language when viewed against the federal coverage proposed in S. 1480 is far from clear, Senator Cannon intended it to be consistent with both S. 1341 and H.R. 85. Explanation to Amendment No. 2387, reprinted at 3 Legis. Hist. 186. In keeping with this intent, the explanation accompanying the amendment stated that, "The amendment would expressly not prevent the states from providing remedies for damages not covered by S. 1480. In addition, states would specifically retain their authority to impose taxes or fees for the purchase of cleanup equipment." *Ibid.* The thrust of the Cannon Amendments was thus to prevent overlapping, duplicative, and unnecessary state programs. *Ibid.*

Following the presidential election in November 1980, the Senate stepped up its efforts to adopt some form of Superfund bill before the end of the lame duck session. 1 Legis. Hist. VII. A group of senators led by Senators Randolph and Stafford, the ranking members of the Senate Committee on Environment and Public Works, introduced their first compromise measure on November 18, 1980. 3 Legis. Hist. 199-287. This proposal contained a substitute to S. 1480 that combined those parts of H.R. 85, H.R. 7020, and S. 1480 where the senators believed that consensus existed. Of particular note is that the first substitute was silent in regard to state taxation. The only mention of preemption was contained in § 114(a) of the substitute which assured states that they would not be preempted from "imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 3 Legis. Hist. 275.

When this substitute measure failed to yield the expected consensus, however, Senators Stafford and Randolph introduced a second proposal. 1 Legis. Hist. 560-680. It was this second substitute to S. 1480, introduced on November 24, 1980, and passed by the Senate on that same day, which eventually became CERCLA. 1 Legis. Hist. VII. In regard to preemption, the compromise retained § 114(a) from the first Stafford/Randolph substitute, thus allowing states to impose additional liability and other requirements regarding releases of hazardous substances. 42 *U.S.C.* § 9614(a). This provision represented a rejection of the Cannon proposal which had restricted a state's options in this area. *See* Amend. No. 2387, reprinted at

3 Legis. Hist. 185-186. The Act did prevent states from imposing financial responsibility requirements, however, thus accepting the Cannon proposal in this regard. *Ibid.* *Compare* 42 *U.S.C.* § 9614(d). Finally, the compromise did contain the language in issue here—42 *U.S.C.* § 9614(c)—which obviously represented an accommodation between those legislators who opposed the preemption of state taxation altogether, and those like Senator Cannon and the supporters of H.R. 85 who supported some limitations on state taxation.

In preempting state taxation only to the extent that such taxes would be used to finance "claims which may be compensated under this subchapter," however, Congress linked preemption to the coverage provided by CERCLA, paralleling the thrust of the preemption provisions proposed earlier in H.R. 85. Despite this parallel, though, the preemption effected by 42 *U.S.C.* § 9614(c) was even less onerous than what had been proposed earlier in the oil-spill context because—unlike H.R. 85—CERCLA was not intended to cover all "compensable damages" including removal costs associated with future spills, but was designed to address only those releases (including abandoned waste sites) that qualified for national priority status. *Compare* the priority focus of CERCLA, 42 *U.S.C.* § 9605(8), with § 104(f) (1) of H.R. 85 which made the fund liable for all removal costs and specified damage claims resulting from a spill (2 Legis. Hist. at 1031 and 1104). Since CERCLA left far more to the states to cover on their own than H.R. 85 had left, therefore, the preemption accomplished by 42 *U.S.C.* § 9614(c) was correspondingly narrower. Moreover, by choosing "may be compensated" over other proposed formulations such as "may be asserted," Congress prevented the use of state funds only for those

claims that had a realistic chance for Superfund compensation and not from financing all claims that conceivably could be raised under CERCLA.

As incorporated in the Superfund Act, then, 42 *U.S.C.* § 9614(c) became an incentive to states to participate fully in the federal cleanup program for priority sites. If states maximized their use of Superfund, they could maintain their own funds supported by state taxes to supplement the federal program. Should states wish to start a competing and duplicative program for priority sites, however, 42 *U.S.C.* § 9614(c) would require such programs to be financed by general revenues.

The legislative history recounted above demonstrates that Congress fully intended to allow states to impose special taxes to supplement federal cleanup efforts. For it simply made no sense in the context of H.R. 85, and makes no sense in the context of CERCLA, to preempt state taxation for needed cleanup efforts and damage compensation that would not be addressed by the federal program.

The limited nature of the preemption accomplished by 42 *U.S.C.* § 9614(c) was confirmed in the Bradley/Randolph colloquy quoted above at pp. 10-11, reprinted at 1 Legis. Hist. 731-733. A close examination of the colloquy reveals substantial similarities to the exchange of remarks that took place earlier between Representatives Biaggi and Florio in regard to the preemption provisions of H.R. 85. Compare 1 Legis. Hist. 731-733 with 2 Legis. Hist. 903-905. Both colloquies demonstrate that continued state taxation was contemplated, and that preemption was intended to reach only to the extent of federal coverage of the problem areas sought to be remedied by the legislation. In Senator Randolph's words, "Any damage not reimbursed by this

bill fund may similarly be the proper subject of a State fund if a State so chooses to construct its fund." 1 Legis. Hist. 732.

The Bradley/Randolph colloquy did establish that there would be no preemption whatsoever of state fund moneys collected prior to the effective date of the legislation. 1 Legis. Hist. 732. Contrary to Exxon's assertions, however, the colloquy also addressed the permissible scope of state taxation *after* the adoption of CERCLA. That this is so is clear from Senator Bradley's question concerning the propriety of using state funds to finance response activities up front in the absence of federal action, and then seeking reimbursement from the federal fund:

> Mr. BRADLEY. In the event I have described, where a State or a contractor of the State is the respondent to the release and incurs economic loss normally compensable under the provisions of this bill, does this legislation intend that *a State that has continued to collect taxes or fees to finance a State fund designed to cover expenses and economic loss not covered under the provisions of this bill* have the right to use those State fund moneys to provide intermediate, up front capital to pay for these activities and seek reimbursement from the fund established under this bill?
>
> Mr. RANDOLPH. Nothing in the language or intent of this bill would prohibit a State from using its fund for the purposes you have inquired about. . . . [1 Legis. Hist. 732, emphasis added].

Moreover, since the colloquy had already established that there was no preemption at all for state taxes collected prior to the adoption of CERCLA, the following statement obviously refers to the collection of state taxes after the enactment of CERCLA:

> Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?
>
> Mr. RANDOLPH. That is correct. [1 Legis. Hist. 733].

Similarly, the remarks confirming the use of state funds to provide the state share of remedial costs and to complete cleanup efforts terminated by the federal government also referred to funds supported by state taxes levied subsequent to the adoption of CERCLA. *Ibid.* Exxon's interpretation of the colloquy which limits it to the use of state taxes collected before the enactment of CERCLA is just plain wrong. As the above excerpts indicate, the colloquy supports New Jersey's interpretation of 42 *U.S.C.* § 9614(c). *See also* the comments of Representative Florio concerning the preemption provision during House debate on CERCLA, 1 Legis. Hist. 780 ("while States may not create duplicate funds to pay damages compensable under this bill, there is no preemption of the State's ability to collect taxes on fees for other costs associated with releases that are not compensable damages as defined in this legislation. It is also intended that state funds can be used to provide the required 10-percent State match.")

Both Houses of Congress have recently reconfirmed the construction of 42 *U.S.C.* § 9614(c) contained in the Bradley/Randolph colloquy and endorsed by the courts below. In considering legislation to reauthorize Superfund, the Senate Committee on Environment and Public Works has proposed an amendment to 42 *U.S.C.* § 9614(c) to clarify the "original intent of the provision." Superfund Amendments of 1984, Sen. Rep. No. 98-631, 98th Cong., 2nd Sess. (September 21, 1984), Comm. Print at 35-36 and 245. As noted in the Committee Report:

> The addition makes clear that in no way are States prohibited from using special taxes to raise their own funds if the funds are expended for costs at Superfund sites under section 104(c)(3). . . . It also includes the costs of responses supplemental in number or degree to those taken under the Fund. State management activities for hazardous substance programs would also be appropriate. [*Ibid.* at 36].

This clarification was deemed necessary by the Committee to clear up "[a]ny cloud of uncertainty over the legitimacy of" state taxes that had been prompted by the instant litigation. *Ibid.* A similar need to clarify existing law was perceived in the House where the Committee on Energy and Commerce has noted that, "The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund." Superfund Expansion and Protection Act of 1984, H. Rep. No. 98-890, Part 1, 98th Cong. 2nd Sess. (July 15, 1984), Comm. Print at 58-59.

Although post-enactment legislative history such as these recent committee reports may not be as persuasive as contemporaneous legislative history, post-enactment history is nonetheless entitled to "significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 *U.S.* 572, 596 (1980). *See also Bell v. New Jersey*, 461 *U.S.* 773, 784-785 (1983). Certainly, the consideration of these reports is in keeping with this Court's desire to review all material relevant to the task of ascertaining legislative intent. *See Watt v. Alaska, supra*, 451 *U.S.* at 265-266; *Andrus v. Shell Oil Co., supra*, 446 *U.S.* at 666. The fact that the post enactment history refers to the instant controversy contributes rather than detracts from the weight that should be

accorded to the reports because the reference makes clear that Congress knew about the dispute and sought to clarify any misinterpretation of its original intent in adopting 42 *U.S.C.* § 9614(c). *See generally North Haven Bd. of Ed. v. Bell*, 456 *U.S.* 512, 535 (1982) (congressional awareness of dispute as reflected in post-enactment developments lends weight to interpretation of statute endorsed by Court).

Both the contemporaneous and subsequent legislative history thus support the conclusion reached below that New Jersey may continue the Spill Fund tax to finance costs not covered or actually compensated by Superfund. To fulfill the will of Congress, therefore, this Court should affirm the judgment of the New Jersey Supreme Court.

Before concluding, however, some mention must be made of the interpretation of 42 *U.S.C.* § 9614(c) urged by the Solicitor General. The Solicitor General focuses on the definition of "claim" contained in CERCLA which means "a demand in writing for a sum certain." 42 *U.S.C.* § 9601(4). Since governmental response costs are distinct from claims on both the federal and State level because they are paid directly from the trust funds established for this purpose without resort to the claims process established in both pieces of legislation, the Solicitor General concludes that governmental response costs are completely beyond the preemptive scope of 42 *U.S.C.* § 9614(c). *See* 42 *U.S.C.* § 9611(a) in which the payment of governmental response costs is explicitly distinguished from the payment of claims; *compare* the claims processes in 42 *U.S.C.* § 9612 and *N.J.S.A.* 58:10-23.11k through *N.J.S.A.* 58:10-23.11q which were not intended to be used for governmental re-

sponse costs.[18] Although this use of the "claims" language differs from New Jersey's reading of 42 *U.S.C.* § 9614(c), it certainly is feasible and is consistent with New Jersey's interpretation to the extent that both are in keeping with the narrow scope of preemption envisioned by Congress and discussed above.

Insofar as third-party damage claims are concerned, however, the Solicitor General finds this area totally preempted by 42 *U.S.C.* § 9614(c). For example, under the Solicitor General's reading, a nongovernmental party who cleans up a site could not be compensated by a state fund even if the cleanup was either not eligible for federal compensation (*e.g.*, site not on NPL), or if the request for reimbursement had been rejected by EPA. Similarly, states would be precluded from financing third-party claims for damage to natural resources, even though CERCLA specifically limits such claims to governmental entities. 42

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[18] The structure of both the federal and New Jersey acts demonstrates that governmental response costs were not meant to go through the claims process. In regard to CERCLA, Congress has noted that governmental response costs were not subject to the procedures for claimants seeking third party damages and response costs since such a process would preclude timely governmental response. 1 Legis. Hist. 371 (Sen. Rep. No. 96-848). Similar reasoning applies to the Spill Act. Moreover, the Superfund program in regard to response costs operates in conjunction with the states through cooperative agreements and contracts, not through claims. 42 *U.S.C.* § 9604(c) (3). States thus agree to pay their percentage of remedial costs up front and do not as a matter of course file claims for response costs against Superfund. Finally, the federal program utilizes these up front funding guarantees from the states and does not operate on a reimbursement basis so that states typically do not file claims for the reimbursement of moneys already expended.

U.S.C. § 9607(f).[19] Such a construction is at odds with the language of 42 *U.S.C.* § 9614(c) and the legislative history recounted above which demonstrates that Congress clearly contemplated that states would use their own tax-supported funds to fill in those areas either not covered or not actually compensated by Superfund. In keeping with this legislative history and the language of the statute, New Jersey reads "which may be compensated under this subchapter" to modify the entire phrase, "claims for any costs of response or damages or claims." While this reading may not reflect the best grammatical usage, those engaged in statutory construction should avoid both scholastic strictness and making "a fortress of the dictionary." *See Watt v. Alaska, supra,* 451 *U.S.* at 266, citing *Cabell v. Markham,* 148 *F.*2d 737, 739 (2d Cir. 1945) (L. Hand, J.), aff'd 326 *U.S.* 404 (1945). As this Court recently observed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 104 *S.Ct.* 2778, 2791 (1984), "We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress." When the Court looks for "that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested," *C.I.R. v. Engle,* 464 *U.S.* 206, 217 (1984), quoting *NLRB v. Lion Oil*

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[19] In the course of developing the compromise that became CERCLA, coverage for damages was severely restricted. As enacted, CERCLA provides no compensation for property damage or medical injuries, only damage to natural resources incurred by governmental entities. Consequently, the definition of "damages" was restricted to mean "damages for injury or loss of natural resources. . . ." 42 *U.S.C.* § 9601(6).

Co., 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part), New Jersey submits that its interpretation of 42 *U.S.C.* § 9614(c) is the only proffered construction to meet this criteria. The State thus urges the Court to affirm the judgment below.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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84-978

No. 84-987

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Appellants,

VS.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

Appeal From the Supreme Court of New Jersey

APPELLANTS' REPLY BRIEF

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Appeal From the Supreme Court of New Jersey

APPELLANTS' REPLY BRIEF

In their opening brief, appellants urged an interpretation of Section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9614(c) (CERCLA), which faithfully reflects the plain meaning of CERCLA's terms, its structure and its legislative history. They demonstrated that an essential aspect of

the compromise which led to CERCLA's passage was the decision to limit to $1.38 billion the special tax imposed on oil and chemicals to create Superfund in response to concerns that any greater tax on such "feedstocks" might unduly burden domestic consumers and put manufacturers at a substantial disadvantage in international markets. (Appnt. Br. 18).[1]

Appellants also showed that, to make the most effective use of this limited fund, Congress created a cooperative federal-state scheme to establish priorities for its use. By recognizing the need for prioritization of cleanup expenditures, Congress acknowledged that, at least during an initial five-year experimental period, a feedstock-tax financed fund could not accomplish the cleanup of all hazardous waste sites. (*Id.* at 13-15). *See also*, NJ Br. at 4-5.

Finally, to protect feedstocks from additional special taxes and to encourage State cooperation in observing the priorities of CERCLA, Section 114(c) preempted similar state funds whose "purpose" was to pay cleanup costs that "may be compensated" under CERCLA. (Appnt. Br. at 19-21).

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[1]By its terms, the CERCLA feedstock tax expired on September 30, 1985, 42 U.S.C. § 9653, and has not been extended.

On September 26, 1985, the Senate adopted H.R. 2005 (originally S. 51), which substantially broadens CERCLA's taxation scheme, so that the feedstock tax accounts for only 19% of the revenues earmarked for Superfund during the next five years. Concomitant with this broadening of the tax base, § 147 of the Senate bill would delete Section 114(c). 131 Cong. Rec. S12184-S12209 (daily ed. Sept. 26, 1985).

Three Superfund financing schemes have been reported by three committees of the House of Representatives in the current session, all styled H.R. 2817. H.R. Rep. No. 253, Parts 1, 2 & 5, 99th Cong. 1st Sess. (1985). All substantially broaden the CERCLA tax base, albeit in ways which differ from one another and from the Senate bill; under the three House proposals the feedstock tax ranges from 14% to 25%. All versions of the House bill explicitly provide that CERCLA does not preempt State funds.

To play the role envisioned for it by Congress, appellants contend that Section 114(c) must preempt New Jersey's Spill Fund because it is based solely on a feedstock tax and has as its purpose the payment of cleanup costs and natural resource damages that qualify for compensation under CERCLA. Any other interpretation would allow the States to multiply the tax burden on oil and chemicals and use special funds derived from such taxes for cleanup without regard to the priorities established by the federal-State cooperative scheme set forth in CERCLA.

In response to appellants' opening brief, New Jersey offers three arguments to sustain its Spill Fund: (1) Even though a purpose of Spill Fund is to pay costs covered by CERCLA, preemption is avoided so long as expenditures from the Fund are limited to areas not covered by CERCLA (NJ Br. 16); (2) Spill Fund escapes preemption because it also has some purposes (such as cleanup of oil spills) not covered by CERCLA (*id.* at 15); and (3) The preemption directed by CERCLA operates merely to preclude state payment of claims actually paid by the federal government (*id.* at 25). None of these contentions saves New Jersey's Spill Fund from the preemption directed by Section 114(c) of CERCLA.[2]

[2]It is unnecessary to discuss at length New Jersey's argument regarding general preemption principles (NJ Br. 17-20), since, for the most part, it merely reiterates the analysis of the State Supreme Court which appellants have shown to be in error. (Appnt. Br. 9-12). However, New Jersey's misreading of *Metropolitan Life Ins. Co.* v. *Massachusetts*, ____U.S. ____, 105 S. Ct. 2380, 2390 (1985), deserves comment. The State cites that case for the proposition that "even in cases involving express pre-emption clauses . . . '[t]he presumption is against pre-emption' . . . ." (NJ Br. 18). This aspect of *Metropolitan Life*, however, was directed to the "presumption" that Congress had not preempted States from exercising authority over insurance companies, a matter long explicitly committed to State, as opposed to federal regulation. *Id.* at 2390. Elsewhere in the opinion, as in *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983), the Court made clear that its task in preemption cases generally is to ascertain Congress' intention, whether "explicitly stated in the statute's language or implicitly contained in its structure and purpose." 105 S. Ct. at 2388.

I. NEW JERSEY'S CONTENTION THAT IT HAS AVOIDED PREEMPTION BY LIMITING SPILL FUND EXPENDITURES TO AREAS NOT COVERED BY CERCLA IS ERRONEOUS.

Section 114(c) indisputably preempts any special state fund whose "purpose" is to pay cleanup costs and natural resource damages which "may be compensated" under CERCLA. New Jersey established its Spill Fund in 1977 to "insure compensation for cleanup costs and damages associated with any discharge of hazardous substances" in accordance with the National Contingency Plan (NCP). (Appnt. Br. 22). Three years later, Congress made clear that all cleanup costs incurred in accordance with the NCP "may be compensated" under CERCLA. (*Id.* at 24).

New Jersey argues that, despite its purpose, Spill Fund avoids preemption because expenditures have been devoted to non-preempted matters. This contention is wrong for two reasons: (1) Under Section 114(c), it is the purpose of a State fund as established by the legislature, rather than the manner in which administrators subsequently expend fund monies, that determines whether the tax which supports the fund is preempted; (2) In any event, payments from New Jersey's Spill Fund have not been limited to matters that are not preempted by CERCLA.

A. The Purpose of New Jersey's Spill Fund Shows That It Is Preempted.

New Jersey concedes that, for the three years prior to CERCLA, "the Spill Fund provided the primary source of revenue for New Jersey's petroleum spill and hazardous waste cleanup program." (NJ Br. 1). However, it asserts that "once [CERCLA] was adopted New Jersey began to administer the Spill Act to supplement rather than to duplicate federal cleanup efforts." (*Id.* at 11). New Jersey never explains how a purported change in the administration of its

Spill Fund is relevant to an inquiry under Section 114(c) regarding the Fund's preempted "purpose."

The closest the State comes to explaining its argument is its contention that it "had the flexibility to adapt its program [to avoid CERCLA preemption] . . . because the New Jersey Legislature had vested broad discretion in the Department of Environmental Protection [DEP] to select the type and extent of cleanup and related activities to be financed by the Spill Act tax." (NJ Br. 11). However, when the Legislature fixed the fund's preempted purpose to conduct cleanup in accordance with the NCP, it also set a tax rate designed to enable the State to fulfill that purpose. Only the Legislature has the authority to change that rate. Thus, even assuming *arguendo* (and contrary to the facts) that, following the enactment of CERCLA, DEP limited expenditures from Spill Fund to oil-spill cleanup and others matters which could not be compensated under CERCLA, DEP did not and could not lower the tax. At most, it could build up unspent revenues in the fund.[3]

Section 114(c) preempts State taxes designed to maintain a fund whose "purpose" is to pay claims which "may be compensated" under CERCLA. During the five years since CERCLA's enactment, appellants have been paying such a tax to New Jersey.[4] Whether the State expended the monies derived from that tax for preempted purposes, diverted them to other uses, or simply accumulated large surpluses,

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[3]As of June 30, 1984, Spill Fund had an unspent balance of $26,859,914. State of New Jersey Spill Compensation Fund, Annual Report for Fiscal Year 1984 (May 1985), p. 5 ("1984 Annual Report").

[4]The revenues raised by the New Jersey Spill tax dramatically increased after CERCLA: In 1978-80, collections were $6.4, $6.4 and $6.8 million; in 1981 and 1982, they were $14.3 and $13.8 million. Division of State Auditing—Audit Report—State of New Jersey—New Jersey Spill Compensation Fund, May 13, 1983 ("NJ Audit Report 1983"), Ex. I, p. 4.

the fact remains that the tax is preempted and appellants are entitled to have their payments returned to them.

As this Court held in *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 13-14 (1983), not even a State legislature can "mask the fact that the purpose and effect of [a State taxing] provision" is preempted. *A fortiori*, when the State legislature itself has explicitly declared a purpose for a State tax which is preempted by federal law, the tax's purpose and effect cannot be "mask[ed]" by subsequent spending decisions of State fund administrators.

B. New Jersey Has Not Limited Expenditures from Spill Fund to Matters Not Covered by CERCLA.

New Jersey's claim that it has in the post-CERCLA era limited expenditures to matters not covered by CERCLA is not only irrelevant for the reasons recited above, but it is also factually erroneous.

Appellants demonstrated in their opening brief (p. 25, n.26) that, for the fiscal years ending June 30, 1981 and June 30, 1982, New Jersey expended $33,432,300 from Spill Fund of which $28,975,000 was for cleanup at two sites — Chemical Control and Goose Farm — which were among the National Priority List (NPL) sites first proposed by New Jersey and were ultimately placed on the NPL.[5] In response, New Jersey observes that these monies, "*if collected* prior to the effective date of CERCLA," would not be preempted (NJ Br. 12, n.7) (emphasis supplied).

The fact is, the vast majority of the massive expenditures made by the State at these two sites had to be financed by taxes collected *after* the enactment of CERCLA. The rec-

[5]Appellants' opening brief reported that $30,905,600 was spent on these two sites in 1981 and 1982. (Appnt. Br. 25 n. 26). This figure incorrectly included $1,930,600 expended on Chemical Control in 1979 and 1980, prior to the enactment of CERCLA.

ord demonstrates that when CERCLA became effective in December 1980, the Spill Fund was reported as having a *negative* balance of $3,256,296. (JA 25, 27). Moreover, on June 30, 1981, after an infusion of $14.3 million in taxes for fiscal year 1981, the balance in the Fund was only $3,250,300.[6] Obviously, New Jersey did not enter the post-CERCLA era with non-preempted cash in its Spill Fund to pay for cleanup costs which "may be compensated" under CERCLA. All of the post-CERCLA expenditures which were made from the Fund had to be derived from taxes collected after CERCLA's enactment.

New Jersey also obliquely suggests (NJ Br. pp. 11-12, n.7) that its expenditures on these two sites can be excused because they had not yet made their way onto the final NPL. This argument is fallacious for two reasons: First, most, if not all, of the expenditures at these two sites was for "removal" (as opposed to "remedial") costs.[7] Removal costs "may be compensated" under CERCLA whether or not a site is on the NPL. (*See* Appnt. Br. 14, 24).

Second, New Jersey nominated both of these sites for inclusion on the NPL, and it was readily apparent that both would appear on that list at the time of its final publication.[8]

[6]NJ Audit Report 1983, Ex. I, p. 4.

[7]*See* NJ Audit Report, 1983, Ex. 1, p. 4, reporting expenditures of $31,054,100 and $1,699,300 for "Hazardous Waste Removal" in Fiscal Years 1981 and 1982, and $0 and $46,200 for those years for "Clean-Up and Restoration." *See also* Division of State Auditing—Audit Report—State of New Jersey—New Jersey Spill Compensation Fund, March 27, 1984, p. 16, referring to $31.6 million in expenditures in Fiscal Year 1981 "due to the occurrence of two major discharges."

[8]The "Interim Priorities List" of 115 sites announced by EPA on October 23, 1981, listed top priority sites targeted by EPA for response action under CERCLA, including Chemical Control and Goose Farm. 12 Env't. Rep. (BNA) 807, 828-830 (Oct. 30, 1981). EPA selected these sites based on prior nominations by the States. 47 Fed. Reg. 58476, 58479 (1982).

Indeed, the Chemical Control site was repeatedly referred to in the legislative deliberations preceeding CERCLA as the type of site that required Superfund response action.[9] Thus, when New Jersey expended cleanup monies at these sites it fully (and correctly) expected that they would ultimately qualify for compensation under CERCLA.

New Jersey's argument that it changed its ways and, after CERCLA, began restricting its expenditures to non-NPL sites is further refuted by its practices in fiscal years 1983 and 1984: In 1983, the State continued to expend substantial sums on both the Chemical Control and Goose Farm sites — $300,648 and $123,797 respectively.[10] In 1984, these expenditures increased to $732,609.50 and $250,053.04.[11] Given the huge expenditures on these two NPL sites, as well as substantial expenditures at others, for the fiscal years 1981-84, 89% of New Jersey's cleanup expenditures — $32,315,446 out of $36,664,847 — were incurred at NPL sites.[12]

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[9]126 Cong. Rec. 30939 (1980) (remarks of Sen. Bradley), *reprinted in* 1 Legis. Hist. at 705; *id.* 30931 (remarks of Sen. Randolph), *reprinted in* 1 Legis. Hist. at 682; S. Rep. No. 848, 96th Cong., 2d Sess. 12 (1980) (quoting EPA Administrator Costle), *reprinted in* 1 Legis. Hist. at 319.

[10]State of New Jersey Spill Compensation Fund, Annual Report for Fiscal Years 1982 and 1983, pp. 12, 13 (April 1984) ("1982 & 1983 Annual Report").

[11]1984 Annual Report, p. 11.

These 1983 and 1984 expenditures at these two NPL sites cannot be justified as merely constituting the State's 10% share of the cleanup costs incurred by the federal government pursuant to Section 104(c) of CERCLA, since through June 30, 1984, the federal government has expended a total of only $782,500 at Chemical Control and $189,000 at Goose Farm. *Id.* at 15. Indeed, of the vast expenditures which New Jersey has made in cleaning up all sites through June 30, 1984, only $2,381,741 constitutes the State's 10% share pursuant to Section 104(c) on approved contracts and approved cooperative agreements. *Id.*

[12]*Id.* at 13; 1982 and 1983 Annual Report, p. 13; NJ Audit Report 1983, p. 11. *See also* the final NPL, 49 Fed. Reg. 19480, 19482 (1984); *id.* 37070, 37083-37085 (1984); 50 Fed. Reg. 6320, 6321-6322 (1985); *id.* 37630. The $36,664,847 figure was derived by totalling Spill Fund expenditures through Fiscal Year 1984 and subtracting from that total the amount of state expenditures through Fiscal Year 1980 (excluding costs of damage claims, research, monitoring projects, and net obligation adjustment). The $32,315,446 figure was derived by using the same method applied to New Jersey's NPL sites, which were identified by comparing the lists of sites in the Annual Reports to the NPL.

Finally, the illusion which New Jersey seeks to create that its Spill Fund has been used only for matters that are not covered by CERCLA is shattered by the State's admission that, following CERCLA, it not only expended Spill Fund monies on items not covered by the federal statute, but also those expenditures extended to "items where federal financing is unavailable," even if covered by CERCLA. (NJ Br. 11).

II. THE NON-PREEMPTED PURPOSES OF NEW JERSEY'S SPILL FUND DO NOT SAVE IT FROM PREEMPTION.

New Jersey argues that a state fund with a preempted purpose is nonetheless permissible, if it has other subsidiary non-preempted purposes. Were Section 114(c) so easily avoidable, it would be a simple matter for a State legislature to include non-preempted matters among the purposes of its fund and thereby escape preemption. Congress certainly did not design Section 114(c) to permit this type of evasion, and it should not be so interpreted.

Moreover, as appellants demonstrated in their opening brief, the record before the New Jersey courts showed that the expenditures paid for by the New Jersey fund which are not covered by CERCLA and thus are not compensable under the statute — *i.e.*, oil spill cleanup, research and administrative costs — amounted to only 6% of the total expenditures from the New Jersey fund. (Appnt. Br. 22-23 n.24). Doubtless for this reason, the New Jersey Supreme

Court did not suggest that the "purpose" of the New Jersey fund was to pay for these expenses.[13] While New Jersey "rejects" appellants' characterization of these expenditures as "incidental" (NJ Br. 21), it does not deny that the record shows that those non-covered expenditures total only 6% of the total expenditures made from the fund.

In an apparent effort to obscure the insignificance of the expenditures made from New Jersey's Spill Fund for items which do not fall within the ambit of CERCLA, the State repeatedly stresses that such items are not covered by that statute, are not compensable from Superfund, and thus are not within the scope of Section 114(c)'s preemption. (*See* NJ Br. 2, 8, 10, 14, 15, 20, 21). Appellants have never contended otherwise. (*See e.g.*, Appnt. Br. 22, n.24). They have instead argued, and the State has effectively failed to deny, that the New Jersey Spill Fund was not established for the purpose of paying these expenses, but instead was designed and has, for the largest part, been employed by the State to finance cleanup expenditures which are within the coverage of CERCLA.

By its terms Spill Fund called for re-examination in the event of Federal legislation. NJS 58:10-23.11z. This requirement stemmed directly from the recognition that subsequent enactment of a federal cleanup statute would most likely preempt New Jersey's tax. See remarks of State Senator McGahn:

> "Finally, [dual] taxation — assuming there is a federal law, there would not be [dual] taxation; there would be

[13]New Jersey asserts that the expenditures for non-covered items "alone support the validity of the Spill Fund tax." (NJ Br. 15). Nothing decided by the State Supreme Court supports this contention; that Court instead rested its decision on the premise that Spill Fund could be used to pay for cleanup costs covered by CERCLA so long as they were not "actually paid" by Superfund.

> preemption of anything as far as the state is concerned."[14]

However, after the enactment of CERCLA, New Jersey ignored both the preemption of Section 114(c) and the prior directive of its Legislature to re-examine its Spill Fund and instead elected to continue collecting a tax on oil and chemicals designed to serve a broad purpose that clearly overlapped CERCLA. Spill Fund is therefore preempted even though some portion of it might have been saved had New Jersey, like other States, taken timely action to accommodate intervening federal legislation.[15]

III. TO READ SECTION 114(c) AS MERELY PREVENTING DOUBLE PAYMENT OF CLEANUP COSTS WOULD NOT ACCOMPLISH ITS CLEAR PURPOSE OF PREVENTING MULTIPLE TAXATION OF OIL AND CHEMICALS.

Appellants have demonstrated (Appnt. Br. 24-27) that the New Jersey Spill Fund cannot be saved by transmuting the phrase "may be compensated" into "actually compensated" or "actually paid," so as to permit New Jersey to maintain a fund for the purpose of paying for CERCLA-eligible cleanup expenditures which the federal government, either for fiscal or policy reasons, does not compensate. Such a construction of the statute defies the plain meaning of its terms, is not supported by the legislative history, ignores the provisos to Section 114(c), and merely duplicates the ban on double recovery set forth in Section 114(b) of CERCLA.

An "actually paid" construction of Section 114(c) would effectively nullify it: Interpreting "may be compensated" as

[14]Public Hearing before Senate Committee on Energy and Environment and Assembly Committee on Agriculture and Environment on S-1409 and A-1903 (Spill Compensation and Control Act), June 2, 1976, p. 26.

[15]See Part V, *infra*.

"actually paid" would mean that Section 114(c) would preempt only those state funds whose "purpose" is to pay claims that are actually paid by the federal government. Since no State would ever impose a tax to create such a fund, Section 114(c), as interpreted by New Jersey, would never preempt any state tax.

New Jersey attempts to avoid the plain meaning and relevant legislative history of the "may be compensated" formulation of preemption used in Section 114(c) by, for the first time in this litigation, inserting the word "realistically" into that phrase. At first blush, New Jersey's "may realistically be compensated" interpretation seems similar to appellants' own view of the statute. *See, e.g.*, NJ Br. at 25-26:

> "[Section 114(c)] presupposes that states will request Superfund financing whenever a site or release falls reasonably within the criteria used to establish NPL ranking for remedial actions, or within the acute toxicity criteria used to determine federal funding for removal actions. To the extent that New Jersey sites remain realistically eligible for federal financing, therefore, Spill Fund revenues could not be used to support independent, state-sponsored cleanup efforts at those sites."

With this formulation of Section 114(c), appellants can readily agree. We recognized in our opening brief (p. 24) that only cleanup costs which are eligible for compensation under CERCLA — *i.e.*, remedial cleanup expenses at NPL sites or removal costs at any site — "may be compensated" under CERCLA.[16]

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[16]Notably, New Jersey claims here only that its Spill Fund "could" be used for non-NPL sites (NJ Br. 24), but does not assert that its fund's "purpose" is to deal with such sites.

New Jersey's "realistically paid" approach asks the Court to assume that every expenditure from Spill Fund on a CERCLA-eligible site was preceded by New Jersey's determination that it was not realistic to expect compensation from CERCLA for such expenditures. As shown above, pp. 7-8, the record does not support any such assumption.

Moreover, New Jersey ultimately transforms its "realistically compensated" test into the same "actual compensated" or "actually paid" test which it had urged at all prior stages of this case. *See* NJ Br. 25:

> "Congress limited preemption to those areas where there was a realistic chance of federal financing. Once that opportunity is foreclosed and ineligibility established for any specific action, though, the 'may be compensated' formulation allows state funds to pick up the slack. It was precisely this situation that the Supreme Court in New Jersey addressed when it found that the Spill Fund could be used to finance hazardous waste cleanup costs and related claims 'not actually paid under Superfund.'"

See also id. at 15-16, where New Jersey argues that it can spend monies on NPL sites after EPA "rejects" its applications for compensation; *id.* at 26.

Thus, under New Jersey's view of the statute, it can use Spill Fund to pay cleanup costs at CERCLA-eligible sites. The only thing that the State believes that Spill Fund cannot be used for is to pay for cleanup expenses which are actually paid by the federal government.

The state cannot identify any support for its "realistically/actually compensated" construction of the statute from CERCLA's explicit terms or legislative history. (*See* pp. 16-20, *infra*). Moreover, it does not even attempt to contradict appellants' showing (Appnt. Br. 27-29) that the

provisos to Section 114(c) — regarding permissible uses of general revenues for purposes for which special funds are preempted and of special funds for prepositioning cleanup equipment — lose all meaning in the face of such a construction. New Jersey never explains how general revenues could possibly be used to pay for expenses actually paid for by the federal government, nor does it offer any reason why, if its restricted view of Section 114(c) was intended by Congress, there was any reason for explicit allowance for special-fund financing of clean-up equipment.

Moreover, New Jersey acknowledges that Section 114(b) explicitly prevents double payment by State and federal funds of cleanup costs — the same meaning it would ascribe to Section 114(c) — but seeks to justify such redundancy by observing that Section 114(b) bars double recoveries from all sources, not merely special State funds. (NJ Br. 27). We, too, assume that Section 114(b) broadly condemns double recovery, but the fact remains that New Jersey's construction of Section 114(c) as serving that function for special funds still reduces the section to useless surplusage in the light of Section 114(b).

Finally, New Jersey never suggests how its construction of Section 114(c) as preempting only a tax which would never have to be collected — *i.e.*, one to finance a fund whose "purpose" is to pay compensation for claims that are "actually" or "realistically" paid by the federal government — attributes any meaning to the section. The state never explains why Congress declared the preemption set forth in Section 114(c), if, as New Jersey argues, it only bars States from doing something which they would never have any reason to do.

IV. NEW JERSEY'S LEGISLATIVE HISTORY ARGUMENT IS MISCONCEIVED.

New Jersey argues that preemption had its genesis in oil spill legislation which Congress anticipated "would cover all

necessary costs involved in responding to future spills and in compensating the limited kinds of property damage and natural resource claims proposed for coverage." (NJ Br. 7). New Jersey thus suggests that, while Congress would have preempted State funds for oil spills had CERCLA covered such incidents, it did not intend to preempt State funds for abandoned hazardous waste site cleanup because federal funding would be insufficient. This argument is wrong on a number of counts.

First, as appellants clearly demonstrated (Appnt. Br. 37-42), the "may be compensated" language of Section 114(c) derives directly from and was recognized by New Jersey in Senate hearings as "virtually the same as" (*id.* at 40) the "may be asserted" language of H.R. 85, the initial oil spill cleanup bill. Had Congress intended the restricted interpretation of Section 114(c) which New Jersey now advances, it would not have used language that corresponds to the initial versions of the preemption clause in CERCLA's predecessor bills, which, as New Jersey concedes, have the same meaning that appellants attribute to Section 114(c).[17]

Second, the State argues that preemption under the Administration Bill (S. 1341) was limited to spills. However, this argument ignores the limitations on cleanup of abandoned hazardous waste sites that was contemplated by that

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[17]New Jersey concedes that a "may be asserted" version of preemption "would have prevented the use of state taxes to finance any claim which could conceivably have been brought under Superfund, regardless of its chances for eventual financing." (NJ Br. 25). In making this argument, New Jersey fails to recognize that, as we pointed out in our opening brief (Appnt. Br. 40), when the "may be compensated" formulation was first proposed, New Jersey in hearings before the Senate Committee on Finance branded it as "virtually the same as [the preemption] in the House oil-spill bill, H.R. 85." H.R. 85, in turn, preempted all claims which could be "asserted for . . . removal costs" and the like. (*Id.* at 38). Until its merits brief in this Court, the State had recognized that the phrase "may be compensated" was of the same breadth as "may be asserted."

bill. As Assistant EPA Administrator Jorling explained in the excerpt cited by the State (NJ Br. 35), there was no preemption in S. 1341 of State funding of costs associated with hazardous substance cleanup at abandoned sites because S. 1341 placed very strict limits on the extent to which the proposed federal fund could be used for the payment of removal or remedial costs at such sites. (1 Legis. Hist. 124, 109-10). CERCLA's coverage for such costs is much broader, and thus Section 114(c) was designed to extend preemption to them.

Third, the State's argument based on its description of H.R. 85 as a "comprehensive federal spill fund" which left "no need for co-extensive state programs" (NJ Br. 34) is erroneous. H.R. 85 covered "discharges" broadly defined in § 101(w) as all emissions, including spilling, leaking, pumping, pouring, emptying or dumping. 2 Legis. Hist. 1021. Moreover, H.R. 85 was amended to cover discharges of all hazardous substances and Congress then specifically added a separate preemption provision, § 302, identical to the one dealing with oil spill cleanup (§ 110) that applied to this extended coverage. There is absolutely nothing in the legislative debate on H.R. 85 to support New Jersey's contention that Congress felt funding under H.R. 85, as amended, would accommodate all costs and damages resulting from discharges of hazardous substances. Nonetheless, the debate on that bill makes clear that Congress intended broad preemption in H.R. 85 of all State special fund payment of claims that could be asserted under that bill.[18]

What clearly emerges from a reading of the extensive legislative history of CERCLA is that the preemptive language of Section 114(c) derived directly from the pre-

[18]125 Cong. Rec. 385 (1979), 126 Cong. Rec. 26196-26197 (1980) (remarks of Rep. Biaggi), *reprinted in* 2 Legis. Hist. at 470, 904.

emptive language used in H.R. 85, S. 1341 and the proposed amendments to S. 1480. The legislative debate analyzing these various preemption provisions fully supports appellants' argument that, while Section 114(c) does not preempt State taxes on feedstocks to provide funding for items not covered by CERCLA (*e.g.*, oil spill cleanup, purchase or positioning of equipment, administrative costs), it does preempt the imposition of such taxes to fund items which are covered by CERCLA.[19]

Finally, as appellants anticipated in their opening brief (Appnt. Br. 42-46), New Jersey's legislative history argument rests heavily upon a single passage in a floor exchange between Senators Randolph and Bradley (NJ Br. 10-11, 41-43). That passage will not bear the weight that New Jersey places upon it.

First, it appears that Senator Randolph was talking in this passage about the preemption of State funds raised before the enactment of CERCLA. He had introduced the matter of existing cleanup funds, pointing out in some detail that the preemption had no application to such funds. He may well have had them in mind in responding to Senator Bradley's immediately following inquiries.

Second, those inquiries consisted of complicated leading questions. Even if Senator Bradley had in mind State funds

[19]H.R. Rep. No. 172, Part 1, 96th Cong., 1st Sess. 22 (1979) (accompanying H.R. 85), *reprinted in* 2 Legis. Hist. at 532; 126 Cong. Rec. 26197 (1980) (colloquy between Representatives Florio and Biaggi on H.R. 85), *reprinted in* 2 Legis. Hist. at 903-905; *id.* 26197-26198 (colloquy between Representatives Snyder and Biaggi on H.R. 85), *reprinted in* 2 Legis. Hist. at 905-907; *id.* 26202-26203 (remarks of Rep. Livingston on H.R. 85), *reprinted in* 2 Legis. Hist. at 919-920; *id.* 27086 (proposed amendment by Sen. Cannon to S. 1480), *reprinted in* 3 Legis. Hist. at 186; 3 Legis. Hist. at 107 (proposed amendment by Sen. Magnuson to S. 1480); *id.* 30949 (remarks of Sen. Randolph on CERCLA compromise), *reprinted in* 1 Legis. Hist. at 731; *id.* 31965 (remarks of Rep. Florio on CERCLA compromise), *reprinted in* 1 Legis. Hist. at 780.

accumulated after CERCLA, one cannot assume a meeting of the minds from Senator Randolph's terse expression of agreement with him. Much greater weight must be attached to the entire course of CERCLA's legislative history and to the more detailed, preceding explanation of the preemption provision by Senator Randolph which fully accords with appellants' construction of Section 114(c).[20]

V. AMICI'S BRIEF HIGHLIGHTS THE INVALIDITY OF THE NEW JERSEY SPILL FUND.

The States who have filed a brief *amici curiae* stress that their taxes are "different from the tax used to support the New Jersey Spill Fund and the federal Superfund." (*Amici* Br. 2). As shown in their brief (*Amici* Br. 2, 4 n.10), California, New York, New Hampshire and Vermont do not impose a feedstock tax to create state spill funds. Instead, these States impose a broad-based tax on generators or disposers of hazardous waste, comparable to the type of tax that was initially contemplated in S. 1480, one of CERCLA's predecessor bills which contained no preemption provision. (*See* Appnt. Br. 40). Moreover, New York and New Hampshire explicitly provide that their funds may not be used for matters covered by CERCLA. 1982 N.Y. Laws Ch. 857 § 19; N.H. Rev. Stat. Ann. § 147-B:6(I).[21]

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[20]Senator Randolph's explanation of Section 114(c) is borrowed almost word for word — including an inadvertent reference to oil spill damage which was not included in the bill he was explaining — from a statement made by Representative Biaggi with respect to H.R. 85. *Compare id.* 30949 (remarks of Sen. Randolph), *reprinted in* 1 Legis.Hist. 732-733, with *id.* 26196-26197 (remarks of Rep. Biaggi), *reprinted in* 2 Legis. Hist. 903. Congressman Biaggi's statement clearly expressed the preemption as extending to claims "compensable" under federal law rather than claims "paid for," the language used by Senator Randolph.

[21]California does not so limit expenditures from its fund, but it acknowledges the central purpose of Section 114(c) by not imposing a duplicative tax on oil and chemicals.

In response to the *amici* brief, we have undertaken a survey of the hazardous waste laws of all 50 States. Eight States apparently maintain no special hazardous waste funds.[22] Of the 42 that do, only New Jersey's Spill Fund is derived from a broad-based feedstock tax. In the other 41 states, funds are financed through taxes or fees on site operators, hazardous waste generators, legislative appropriations, miscellaneous and other sources or some combination thereof.[23]

Thus, New Jersey stands alone in its imposition of a tax on oil and chemicals which duplicates the tax imposed by CERCLA. That all of the other States have managed to create or maintain funds which accommodate CERCLA's ban against double taxation on oil and chemicals clearly shows that there are no arguments of expediency or compelling public policy to justify New Jersey's refusal to modify its fund so as to avoid CERCLA's preemption.[24]

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[22]Alaska, Arkansas, Delaware, Hawaii, Nebraska, North Dakota, South Dakota and Wyoming.

[23]Attached as an Appendix to this brief is a list of the 41 state statutes concerning hazardous waste funds with citations to the provisions describing the sources of the monies for those funds.

Florida supports two funds — the "Florida Coastal Protection Trust Fund" and the "Water Quality Assurance Trust Fund" — by taxes of 2¢ per barrel payable by operators of facilities that store, transfer or handle "pollutants." Fla. Stat. Ann. §§ 376.11(4)(1), 376.307(5)(a). "Pollutants" are defined to include oil, gasoline, pesticides, ammonia and chlorine. *Id.* § 376.031. A third fund, the "Hazardous Waste Management Trust Fund," is financed by appropriations, cost recoveries and miscellaneous gifts and bequests. *Id.* § 403.725, *as amended by* 1985 Fla. Sess. Law Serv. ch. 85-164, § 6 (West).

[24]The legal arguments raised by *amici* can be briefly answered. Their contention (*Amici* Br. 14) that Section 114(c)'s preemption was not effective until the final NPL was published ignores the fact that Congress explicitly made Section 114(c) effective upon the enactment of CERCLA and rejected a proposal to delay its effectiveness for the same 180 days which Congress prescribed for publication of the NPL. Moreover, Congress cast the section's

CONCLUSION

The purpose of the preemption expressed in Section 114(c) is to prevent duplicative state taxes on oil and chemicals for hazardous waste cleanup. Spill Fund is precisely such a tax and should, accordingly, be held invalid.

Respectfully submitted,

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preemptive "may be compensated" language in prospective terms which envision ultimate eligibility for CERCLA compensation. Finally, removal expenditures were immediately eligible for CERCLA compensation, since they are in no way dependent upon designation of a site on the NPL.

Amici's reliance on Section 107 is irrelevant to the issues raised in this case. (*Amici* Br. 9-11). As *amici* state, that section allows "states to initiate cost recovery actions against specified [responsible] parties for [remedial action] expenditures." (*Id.* at 9). Appellants have never suggested that Section 114(c) of CERCLA or any other provision of the statute prohibits States from raising funds in this fashion to pursue cleanup of hazardous waste sites.

Amici assert that appellants have not explained Congress' willingness to allow States to use general revenues to pursue cleanup without regard to the priorities prescribed under CERCLA. *Amici* Br. 12 n.15. However, appellants' opening brief (Appnt. Br. 20-21) specifically addressed this issue.

Finally, *Amici's* reiteration of the Solicitor General's argument adds nothing to the points that he has already made and which appellants thoroughly answered in their opening brief. (Appnt. Br. 29-32).

APPENDIX

APPENDIX

SUMMARY OF STATE FUNDS

Alabama. The "Alabama department of environmental management fund" is financed by permit fees, penalties, fines, appropriations, grants and federal funds. Ala. Code §§ 22-22A-11, 22-22A-5(16).

Alaska. None.

Arizona. Arizona has three hazardous waste funds. The "water quality assurance revolving fund" is financed by legislative appropriations and collected penalties. Ariz. Rev. Stat. Ann. § 36-1854.01. The "hazardous waste trust fund" is financed by fees collected for the use of hazardous waste disposal facilities. *Id.* § 36-2805. The "hazardous waste management fund" is financed by fees on waste facility permit applicants and appropriations. *Id.* § 36-2826.

Arkansas. None.

California. The "Hazardous Substance Account" and the "Hazardous Substance Compensation Account" are financed by taxes on hazardous waste generators, fines, penalties, costs recovered from liable parties, legislative appropriations and federal CERCLA money. Cal. Health & Safety Code §§ 25330, 25343, 25345, 25360, 25380, 25381.

Colorado. Colorado has four funds relating to hazardous waste cleanup. The "hazardous waste service fund," used for the state's expenses in maintaining or supervising hazardous waste facilities, is financed by fees on facility operators. Colo. Rev. Stat. §§ 25-15-303(5), 25-15-304. Second, a county or municipality may set up a "county or municipal hazardous waste disposal site fund", financed by taxes on property within the jurisdiction. *Id.* § 25-15-213. Third, a county or municipality may also establish a separate "hazardous waste disposal site fund", financed by annual fees on private hazardous waste facilities. *Id.* § 25-15-214. Finally, an "emergency response cash fund", financed by penalties and costs recovered in lia-

bility actions, is available for certain emergency responses. *Id.* § 29-22-105.

Connecticut. Connecticut has two hazardous waste funds. The "disposal facility trust fund", used principally for monitoring an maintenance costs, is financed by fees on owners and operators of hazardous waste facilities. Conn. Gen. Stat. Ann. § 22a-126(b). The "emergency spill response fund", used for oil and hazardous waste cleanup, is financed by taxes on hazardous waste generators and treatment facilities, as well as by costs and damages recovered in liability actions. *Id.* §§ 22a-132, 22a-451.

Delaware. None.

Florida. Florida has three special funds. The "Hazardous Waste Management Trust Fund" is financed by appropriations, cost recoveries in liability actions and miscellaneous gifts or bequests. Fla. Stat. Ann. § 403.725, *as amended by* 1985 Fla. Sess. Law Serv. ch. 85-164, § 6 (West). The "Florida Coastal Protection Fund" is financed by taxes of 2¢ per barrel payable by operators of terminal facilities that handle "pollutants," defined to include oil, gasoline, pesticides, ammonia and chlorine, as well as by penalties, cost reimbursements and miscellaneous other fees and charges. *Id.* §§ 376.11(2), (4)(a); 376.031. The "Water Quality Assurance Trust Fund" is financed by taxes of 2¢ per barrel payable by operators of terminal facilities and other facilities that store, handle or transfer pollutants, and by transfers from other state funds. *Id.* §§ 376.307(3), (5).

Georgia. Georgia has two hazardous waste funds. The "hazardous waste facility trust fund" is financed by bonds or other financial responsibility instruments forfeited by owners or operators of certain waste disposal facilities. Ga. Code Ann. § 12-8-68(d). The "hazardous waste trust fund" is financed by civil penalties. *Id.* §§ 12-8-68(e), 12-8-81(d).

Hawaii. None.

Idaho. Idaho has three hazardous waste funds. The "hazardous waste emergency account" is financed by appropriations,

cost recoveries, and miscellaneous other (unidentified) sources. Idaho Code § 39-4417. The "hazardous waste training, emergency and monitoring account" is financed by fees on transporters and waste facility operators, appropriations, donations, gifts, and grants. *Id.* § 39-4417B. The "hazardous waste disposal fee refund account" is financed by fees on operators and penalties. *Id.* § 39-4432.

Illinois. Illinois has two special funds — the "Hazardous Waste Fund" and the "Hazardous Waste Research Fund" — both of which are financed by fees imposed on waste facility owners or operators. Ill. Ann. Stat. ch. 111 § 1022.2.

Indiana. Indiana has three special hazardous waste funds. The "hazardous substances emergency response trust fund" is financed by taxes on waste facility operators for the disposal of hazardous waste. Ind. Code Ann. §§ 6-6-6.6-2, 6-6-6.6-3, 13-7-8.7-2. The "hazardous waste training trust fund" is financed by fees on facility owners. *Id.* § 13-7-8.6-11. Finally, the "Environmental Management Special Fund" is financed by fees collected from waste facility applicants and civil penalties. *Id.* §§ 13-7-13-2, 13-7-8.6-4(e).

Iowa. The "hazardous waste remedial fund" is financed by fees on generators, transporters and waste faiclity owners and operators, penalties, general revenues, federal funds, and gifts. Iowa Code Ann. §§ 455B.423, 455B.424.

Kansas. The "hazardous waste perpetual care trust fund" is financed by fees on waste facility operators and by civil penalties. Kan. Stat. Ann. §§ 65-3431(w), 65-3444(d).

Kentucky. The "hazardous waste management fund" is financed by annual fees on hazardous waste generators. Ky. Rev. Stat. Ann. § 224.876(6), (11).

Louisiana. Louisiana has three funds relating to hazardous waste releases. The "Environmental Emergency Response Fund" is financed by costs recovered from liable parties, penalties, legislative appropriations and federal grants. La. Rev. Stat. Ann. § 30:1079(A). The "Hazardous Waste Protection

Fund" is financed by bonds forfeited to the state, fees on hazardous waste facility operators, legislative appropriations and federal grants. *Id.* §§ 30:1141, 30:1143. The "Hazardous Waste Site Cleanup Fund" is financed by the same sources as the "Environmental Emergency Response Fund", as well as miscellaneous grants, appropriations and cost reimbursements. *Id.* § 30:1149. In addition, Louisiana imposes on waste generators and disposers a tax on waste storage and disposal and an additional one-time tax on the hazardous waste content of land. Both taxes are payable to the Department of Revenue and Taxation. *Id.* §§ 30:1149.21- 23, 47:822-827.

Maine. The "Maine Hazardous Waste Fund" is financed by fees on waste generators and transporters and on applicants for, and operators of, hazardous facilities and by cost recoveries and penalties. Me. Rev. Stat. Ann. tit. 38, §§ 1319-D, -E, -H, -I.

Maryland. The "State Hazardous Substances Control Fund" is financed by waste facility application and permit fees, renewal fees, penalties, fines, loans and appropriations. Md. Health & Env. Code Ann. § 7-219.

Massachusetts. The "Massachusetts Oil and Hazardous Material Release Prevention Act" authorizes state agencies to impose fees on licensed hazardous waste transporters to be used to pay for state response actions, although the Act does not create a separate fund. Mass. Ann. Laws ch. 21C, § 7.

Michigan. Michigan has had three funds relating to hazardous waste. The "Disposal Facility Trust Fund", abolished in 1983, was financed by fees on waste facility operators. Mich. Stat. Ann. § 13.30(42). The "Hazardous Waste Service Fund" and the "Environmental Response Fund" are financed by appropriations. *Id.* §§ 13.30(43), 13.32(9).

Minnesota. The "Environmental Response, Compensation and Compliance Fund" is financed by taxes on hazardous waste generators, cost reimbursements, penalties and various grants and appropriations. Minn. Stat. §§ 115B.20, 115B.22. The

"state waste management fund" is financed by state bonds and appropriations. *Id.* § 115A.57.

Mississippi. Fees collected from commercial hazardous waste facilities are held in an account maintained in the state Department of Natural Resources for the perpetual care and maintenance of hazardous waste facilities. Miss. Code Ann. § 17-17-53.

Missouri. Missouri has two special funds. The "Hazardous Waste Fund" is financed by permit and license fees, fees and taxes on generators and transporters, appropriations, federal grants and miscellaneous other sources. The "Hazardous Waste Remedial Fund" is financed by fees and taxes on generators, penalties, gifts, bequests, appropriations, reimbursements, and federal grants. Mo. Ann. Stat. §§ 260.380, .390, .391, .475, .478, .480, *as amended by* 1985 Mo. Legis. Serv. No. 5, p. 135 *et seq.* (Senate Bill No. 110) (Vernon).

Montana. The "environmental quality protection fund" is financed by cost reimbursements, penalties, appropriations and funds received in other state accounts including, indirectly, the resource indemnity trust interest account. The latter account is financed by taxes on mine operators engaged in mining, extracting or producing minerals. Mont. Code Ann. §§ 75-10-704, 75-1-1101, 15-38-104, 15-38-106, 15-38-201.

Nebraska. None.

Nevada. Nevada has two hazardous waste funds. The "fund for the management of hazardous waste" is financed by proceeds and fees for the use of state-owned disposal facilities, civil penalties, and cost recoveries. Nev. Rev. Stat. § 444.752, *as amended by* 1985 Nev. Stat. Ch. 299, § 5. The "emergency trust fund" is financed by appropriations. *Id.* § 353.263.

New Hampshire. The "New Hampshire Hazardous Waste Cleanup Fund" is financed by fees on waste generators and hazardous waste facilities. N.H. Rev. Stat. Ann. §§ 147-B:3, -B:6, -B:8 *as amended by* 1985 N.H. Laws Ch. 346.

New Mexico. The "hazardous waste emergency fund" is financed by cost reimbursements. N.M. Stat. Ann. §§ 74-4-7, 74-4-8.

New York. The "Hazardous Waste Remedial Fund" is financed by fees on hazardous waste generators and waste facility permitees, penalties and appropriations. N.Y. State Finance Law, § 97-b; N.Y. Environmental Conservation Law, § 27-0923.

North Carolina. North Carolina has two hazardous waste funds. The "Hazardous Waste Fund" is financed by fees on waste facility operators. N.C. Gen. Stat. §§ 130A-298, 130A-294(a)(6). The "Oil or Other Hazardous Substances Pollution Protection Fund" is financed by permit fees, penalties, cost reimbursements and appropriations. *Id.* § 143-215.87.

North Dakota. None.

Ohio. Ohio has established two special hazardous waste funds. The "Hazardous Waste Facility Management Special Account" is financed by fees on owners and operators of waste disposal facilities. Ohio Rev. Code Ann. § 3734.18. The "Hazardous Waste Clean-up Special Account" is financed by penalties, reimbursement costs and miscellaneous other payments. *Id.* § 3734.28.

Oklahoma. The "Controlled Industrial Waste Fund" and "The State Emergency Fund" are financed by state appropriations. Okla. Stat. Ann. tit. 63, § 1-2018; *id.* tit. 62, §§ 139.42, 139.47, *as amended by* Okla. Sess. Law Serv. Ch. 115 (West).

Oregon. Oregon requires that waste facility owners and operators deed their sites to the state and then pay fees into a state account for closure, monitoring and remedial action. Or. Rev. Stat. §§ 459.590, 459.600.

Pennsylvania. The "Solid Waste Abatement Fund" is financed by forfeited facility operator bonds, fines and penalties. 35 Pa. Cons. Stat. Ann. § 6018.505, .605, .606 and .701.

Rhode Island. The "environmental response fund" is financed by state bonds, appropriations, penalties and cost reimbursements. R.I. Gen. Laws § 23-19.1-23.

South Carolina. The "Hazardous Waste Contingency Fund" is financed by fees on generators and owners and operators of waste facilities and by appropriations. S.C. Code Ann. §§ 44-56-160, 44-56-170.

South Dakota. None.

Tennessee. Tennessee has two hazardous waste funds. The "hazardous waste remedial action fund" is financed by fees on generators and transporters, civil penalties, fines, federal grants, and appropriations. Tenn. Code Ann. §§ 68-46-204, 68-46-203. The "responsible waste disposal incentive fund" is financed by fees on waste facility operators and appropriations. *Id.* §§ 68-46-210, 68-46-211.

Texas. Texas has four special funds. The "Disposal Facility Response Fund" is financed by state appropriations and federal grants. Tex. Water Code Ann. § 26.304. The "Texas Coastal Protection Fund" is financed by appropriations, fines, penalties and cost reimbursements. *Id.* § 26.265. The "hazardous waste generation and facility fees fund" is financed by fees on hazardous waste generators and waste facility operators. The "hazardous waste disposal fee fund" is financed by fees on waste facility operators. Tex. Civ. Stat. Ann. art. 4477-7, § 11, *as added by* 1985 Tex. Sess. Law Serv. Ch. 567 (Vernon).

Utah. Utah has a hazardous waste fund financed by cost reimbursements. Utah Code Ann. § 26-14-20.

Vermont. The "Environmental Contingency Fund" is financed by taxes on waste generators, permit application fees, cost reimbursements and federal grants. Vt. Stat. Ann. tit. 10, § 1283; Vt. Stat. Ann. tit. 32, § 10103.

Virginia. Virginia authorizes the state Water Control Board to acquire waste facilities and to collect fees from facility users. Va. Code § 32.1-178.

Washington. The "hazardous waste control and elimination account" is financed by fees on waste facility operators and on a wide range of persons engaged in waste-producing business activities, as well as by fines and penalties. Wash. Rev. Code Ann. §§ 70.105A.050, .030, .040; 70.105.180. Washington law also authorizes the collection of fees from waste facility users for the perpetual care of state waste facilities. *Id.* § 70.105.040.

West Virginia. The "Hazardous Waste Emergency Response Fund" is financed by fees on waste generators. 8 W.Va. Code §§ 20-5G-1, 20-5G-4.

Wisconsin. Wisconsin has four hazardous waste funds. The "waste management fund" is financed by fees on and certain reimbursements from waste facility owners and operators. Wis. Stat. Ann. §§ 25.45, 144.441(3), (5). The "groundwater fund" is financed by fees on generators and by miscellaneous other permit fees and fees on the sale of fertilizers and pesticides. *Id.* § 25.48, § 144.441(7). The "environmental repair fund" is financed by fees on waste facility owners and operators and cost reimbursements. *Id.* §§ 25.46, 144.442, 144.76(6)(c). The "investment and local impact fund" is financed by taxes and fees on metalliferous mine operators. *Id.* §§ 70.375, 70.395.

Wyoming. None.

No. 84-978

In the Supreme Court of the United States

OCTOBER TERM, 1984

EXXON CORPORATION, ET AL., APPELLANTS

v.

ROBERT HUNT, ADMINISTRATOR OF
NEW JERSEY SPILL COMPENSATION FUND, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a provision of the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), 42 U.S.C. 9614(c), preempted the previously enacted New Jersey Spill Compensation and Control Act, N. J. Stat. Ann. §§ 58:10-23.11 *et seq.*

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The Solicitor General submits this brief in response to the Court's order inviting a brief expressing the views of the United States regarding this appeal.

STATUTES INVOLVED

We follow the nomenclature adopted by the parties and the courts below. Accordingly, "Superfund" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, enacted by Congress on December 11, 1980, and "Spill Fund" means the New Jersey Spill Compensation and Control Act, N.J. Stat. Ann. § 58:10-23.11 *et seq.* (West 1982), enacted on January 6, 1977, and thereafter amended.

Superfund

Section 114 of Title I of "Superfund", 42 U.S.C. 9614, provides in pertinent part:

* * * * *

(b) Any person who receives compensation for removal costs or damages or claims pursuant to this [Act] shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from reciving compensation for the same removal costs or damages or claims as provided in this [Act].

(c) Except as provided in this [Act], no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this [title] [42 U.S.C. 9601-9615]. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

Spill Fund

Section 9a of Spill Fund, as amended, N.J. Stat. Ann. § 58:10-23.11h (West 1982), provides in pertinent part:

> There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances. * * *

Section 10 of Spill Fund, N.J. Stat. Ann. § 58:10-23.11i (West 1982), provides in pertinent part:

> The New Jersey Spill Compensation Fund is hereby established as a nonlapsing, revolving fund in the Department of the Treasury to carry out the purposes of this act. The fund shall be credited with all taxes and penalties related to this act. * * *

Section 16 of Spill Fund, N.J. Stat. Ann. § 58:10-23.11*o* (West 1982), provides in pertinent part:

> Moneys in the New Jersey Spill Compensation Fund shall be disbursed by [its] * * * administrator for the following purposes and no others:
>
> (1) Costs incurred under section 7 of this act [N.J. Stat. Ann. § 58:10-23.11f]; [1]
>
> (2) Damages as defined in section 8 of this act [N.J. Stat. Ann. § 58:10-23.11g]; [2]
>
> (3) Such sums as may be necessary for research on the prevention and the effects of spills of hazardous substances on the marine environment and on the development of improved cleanup and removal operations as may be appropriated by the Legislature; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund;
>
> (4) Such sums as may be necessary for the boards, general administration of the fund, equipment and personnel costs of the department and any other State agency related to the enforcement of this act as may be appropriated by the Legislature.

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[1] The "costs" described in N.J. Stat. Ann. § 58:10-23.11f are those incurred for "hazardous substance" removal undertaken or arranged by the New Jersey Department of Environmental Protection.

[2] The "damages" described in N.J. Stat. Ann. § 58:10-23.11g include but are not limited to five categories of damages caused by the "discharge" of a "hazardous substance," namely: costs of restoring, replacing, or repairing damaged real or personal property; costs of restoration or replacement of natural resources; loss of income or earning capacity attributable to property damage; loss of state and local tax revenue attributable to property damage; and interest on loans obtained by a claimant to ameliorate the adverse effects caused by a discharge.

(5) Such sums as may be appropriated by the Legislature for research and demonstration programs concerning the causes and abatement of ocean pollution; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund.

STATEMENT

1. In 1977, the State of New Jersey enacted the Spill Compensation and Control Act (Spill Fund), N.J. Stat. Ann. § 58:10-23.11 *et seq.* (West 1982), to deal with oil spills, toxic waste sites, and other discharges of hazardous substances. An excise tax was imposed on major petroleum and chemical facilities. N.J. Stat. Ann. § 58:10-23.11h. Revenue from the tax was placed in a fund and could be used for five purposes: (1) the removal or cleanup by the state of hazardous substances (N.J. Stat. Ann. §§ 58:10-23.11*o*(1), 58:10-23.11f); (2) payment of damages sustained and cleanup costs incurred by other parties as a result of the discharge of hazardous substances (N.J. Stat. Ann. §§ 58:10-23.11*o*(2), 58:10-23.11g); (3) research on the effects of spills and improved cleanup operations (N.J. Stat. Ann. § 58:10-23.11*o*(3)); (4) administrative and personnel costs (N.J. Stat. Ann. § 58:10-23.11*o*(4)); and (5) research on ocean pollution (N.J. Stat. Ann. § 58:10-23.11*o*(5)). The fund was made "strictly liable * * * for all cleanup and removal costs and for all direct and indirect damages." N.J. Stat. Ann. § 58:10-23.11g(a). Dischargers, in turn, were made strictly liable, within limits, to the fund. N.J. Stat. Ann. § 58:10-23.11g(b) and (c).

2. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. 9601 *et seq.*, to deal with problems created by hazardous substances. A fund was created, financed primarily by a federal excise tax (which is set to expire on September 30, 1985) on petroleum and specified hazardous chemicals. Money from this fund may be used to pay for the removal of hazardous wastes and longer term remedial action[3] (§ 111(a)(1), 42 U.S.C. 9611(a)(1)), for certain additional governmental costs (§ 111(a)(4), 42 U.S.C. 9611(a)(4)), and for the payment of two types of "claims": "claims" for response costs incurred by any other person in accordance with a federal plan (§ 111(a)(2), 42 U.S.C. 9611(a)(2)) and "claims" for some types of environmental damage asserted by certain government entities (§ 111(a)(3), 42 U.S.C. 9611(a)(3)). Superfund also contains a preemption provision (§ 114, 42 U.S.C. 9614) that is the subject of this litigation.

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[3] "Removal" involves cleanup, whereas " 'remedial action' means those actions consistent with permanent remedy." See § 101(23) and (24), 42 U.S.C. 9601(23) and (24). These activities are described collectively as "governmental response" activities. § 101(25), 42 U.S.C. 9601(25).

"[G]overnmental response" activities must be "consistent with" the National Contingency Plan as periodically published by the Environmental Protection Agency (§§ 104(a)(1), 105, 42 U.S.C. 9604(a)(1), 9605; 40 C.F.R. Pt. 300; *National Oil and Hazardous Substances Pollution Contingency Plan: Proposed Rule*, 50 Fed. Reg. 5862 (1985)). A required component of the National Contingency Plan is the National Priorities List of hazardous waste sites to be targeted for governmental response (§ 105(8)(B), 42 U.S.C. 9605(8)(B); 49 Fed. Reg. 37070 (1984)).

Removal actions, in the absence of special findings, "shall not continue after" $1 million from the trust fund has been obligated for this purpose or six months have passed. Remedial actions must be preconditioned; the state in which remedial action is desired must first enter into a contract or cooperative agreement with the United States and, among other things, agree to pay at least 10% of the cost. § 104(c)(3)(C) and (d)(1), 42 U.S.C. 9604(c)(3)(C) and (d)(1). Such remedial action must conform to the National Contingency Plan (§ 104(c)(4), 42 U.S.C. 9604(c)(4)). The Plan in turn, establishes that trust-fund-financed remedial actions will only be authorized at sites on the National Priorities list (40 C.F.R. 300.68(a); 50 Fed. Reg. 5869 (1985)). Currently, 85 sites in New Jersey are on the National Priorities List with another 10 proposed. Nevertheless their inclusion does not guarantee receipt of trust-fund moneys (47 Fed. Reg. 31180, 31187 (1982)).

3. Appellants are corporations that have paid the New Jersey Spill Fund tax since 1977. They contend that Superfund preempted any state tax used "to pay compensation for claims and costs which may be compensated under Superfund" (J.S. 7).

The present suit is at least the fourth brought to test the continued validity of the Spill Fund tax. The appellants in this case first brought suit in the United States District Court for the District of New Jersey seeking a declaratory judgment of preemption, but their suit was dismissed and the dismissal was affirmed on jurisdictional grounds. *Exxon Corp.* v. *Hunt*, 683 F.2d 69 (3d Cir. 1982), cert. denied, 459 U.S. 1104 (1983). New Jersey likewise brought suit in the United States District Court for the District of Columbia seeking a declaratory judgment that its tax was valid. This suit was dismissed for lack of a case or controversy because no federal enforcement action had been initiated or threatened. *New Jersey* v. *United States*, 16 Env't Rep. Cas. (BNA) 1846 (D.D.C. 1981).

Meanwhile, a member of the New Jersey legislature and others initiated a third declaratory judgment action against the federal government in the District of New Jersey. This suit was settled pursuant to an agreement stipulating that Superfund did not preclude New Jersey from spending Spill Fund monies for seven purposes. *Lesniak* v. *United States*, 17 Env't Rep. Cas. (BNA) 1455, 1456 (D.N.J. 1982).[4]

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[4] In the stipulation of settlement, the government agreed that Section 114(c), 42 U.S.C. 9614(c), did not preclude New Jersey from spending Spill Fund monies "collected pursuant to N.J. Stat. Ann. § 58:10-23.11 *et seq.*" for the following purposes (17 Env't Rep. Cas. (BNA) at 1456):

(1) to finance the removal of a petroleum discharge;

(2) to finance the administrative costs of the New Jersey Spill Compensation Fund;

(3) to finance the purchasing or prepositioning of hazardous substance response equipment and to finance other preparations for responding to releases which affect the State of New Jersey;

(4) to finance the State share, if any, of the cost of response activities conducted pursuant to CERCLA to respond to a release of a hazardous substance;

(5) to compensate claims for the cost of restoration and replacement of any natural resources damaged or destroyed by a release of a hazardous substance;

(6) to advance funds to remove or remedy releases of hazardous substances eligible to be financed by the CERCLA Hazardous Substance Response Fund (hereinafter "Response Fund") if a written commitment for financing by the Response Fund has been issued by an authorized representative of the United States Environmental Protection Agency; and

(7) to compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by the Response Fund but for which no federal reimbursement from the Response Fund is provided.

4. In August 1981, appellants commenced this suit in the New Jersey Tax Court against the State of New Jersey and various state officials seeking both a declaratory judgment of preemption and the return of all monies paid into Spill Fund since Superfund was enacted. On cross-motions for summary judgment, the tax court held that the state tax was not preempted by Superfund (J.S. App. 47a). The court first held (*id.* at 72a) that the preemption provision of Superfund allowed state taxation "to be used to pay hazardous waste cleanup costs and related claims not covered or actually compensated under super fund." The court then held in the alternative (*id.* at 72a) that "[e]ven if it were found that industry-supported tax monies could not be collected for general containment, cleanup and remedial purposes," the spill fund law still encompassed nonpreempted areas "more than sufficient to sustain its continued validity" under principles of severability (*id.* at 77a).

The Appellate Division of the Superior Court affirmed (J.S. App. 37a, 39a; 190 N.J. Super. 131 (1983)). The

majority adopted the Tax Court's opinion without elaboration.[5] A concurring opinion contended that Congress could not constitutionally "preempt New Jersey's taxation provision if it so intended" (J.S. App. 41a).

On certification, the New Jersey Supreme Court likewise held that the Spill Fund tax was not preempted. Like the tax court, the state Supreme Court held (J.S. App. 36a) "that the Spill Fund tax imposed on [appellants] is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate state hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund."

DISCUSSION

We cannot agree with the analysis or conclusions of either party or the lower courts in this case. In our view, New Jersey's Spill Fund Tax is partially preempted as explained herein.

1. In inquiring whether the preemption provision of Superfund, § 114(c), 42 U.S.C. 9614(c), affects the New Jersey Spill Fund, we begin with the language of the federal statute. Both of the parties and the courts below appear to have misread this statutory language. Section 114(c) of Superfund provides in pertinent part:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter.

a. At the outset, it should be noted that, contrary to the contention of appellants and indeed to certain statements in the legislative history,[6] Section 114(c) is much

[5] In addressing a separate consolidated appeal, the Appellate Division held (J.S. App. 40a) that the Spill Fund regulations adopted by the State's Treasury Department were invalid for procedural reasons. The validity of these regulations was not further litigated in subsequent phases of this case.

[6] See 1 Library of Congress, Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510*, at 732 (Comm. Print 1983) [hereinafter cited as *Leg. Hist.*].

more than a prohibition of "double taxation." Section 114(c) states unambiguously that "[e]xcept as provided in [Superfund], *no person* may be required to contribute to" a certain type of fund (emphasis added). This means that Section 114(c) applies to all taxpayers, not just corporations and not just those oil and chemical companies taxed under Superfund. Appellants are thus flatly wrong in stating (J.S. 8) that Section 114(c) forbids the imposition of certain taxes "on a limited class of persons."

b. The validity of requiring a contribution to a "fund" is judged under Section 114(c) by the "purpose" of the fund. We assume that Congress, in employing this term, did not intend to require an examination of legislative motive and that the "purpose" of the fund is to be judged by, and is in effect the same thing as, the use to which the fund's money may be put. Accordingly, what is prohibited by Section 114(c) are certain statutorily authorized uses of the fund's money.

Congress's choice of the term "purpose" presents an additional problem since a fund financed by a state tax may have multiple "purposes" or uses. There are three possible answers to this problem. First, Congress might have intended to preempt a state tax in its entirety if any one of its purposes or uses is impermissible. This construction, however, would be contrary to the rule, derived directly from basic principles of federalism, that state legislation is invalid under the Supremacy Clause only if and only "to the extent that it actually conflicts with federal law." *Pacific Gas & Electric* v. *Energy Resources Commission*, 461 U.S. 190, 204 (1983); see also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

The opposite construction—that the state tax is valid if any of its purposes is permissible—would run afoul of the same rule. It would allow a state law to stand even though it remained in partial conflict with federal law.

The third possible construction therefore seems to us the correct one. Under this interpretation, a state tax is invalid only to the extent that its purposes are impermissible. In other words, Section 114(c) prohibits a state from permitting money from any tax-supported fund to be spent for certain purposes or uses. Of course, if some but not all of these purposes or uses are invalid under Section 114(c), a question may be raised whether the remainder of the state law can stand. Such a question would be presented if the remaining permissible uses of money in a tax-supported fund were dwarfed by the revenue raised by the tax. But this would be an ordinary question of severability to be decided by the state courts based on all the available evidence regarding the intent of legislature, including the presence in the state statute of a severability clause. See J.S. App. 75a.

c. We now turn to the crux of this case: the uses to which fund money may not be put. There are two such uses. The first is "to pay compensation for claims of any costs of response or damages." The second is "to pay compensation for * * * claims which may be compensated under this subchapter." Both parties (see J.S. 8; Mot. to Dis. or Aff. 16) and the New Jersey courts (J.S. App. 22a, 60a) have assumed that Section 114(c)'s prohibition applies only to claims that "may be compensated under [Superfund]," but that is not a plausible interpretation of the statutory language. The clause "which may be compensated under [Superfund]" does not modify the phrase "claims for any costs of response or damages." If it did, Section 114(c) would have to be read as though it prohibited the use of fund money

> to pay compensation for claims for any costs of response or damages [which may be compensated under this subchapter] or claims which may be compensated under this subchapter.

Such a provision would be absurdly redundant. Moreover, under standard usage, the placement of the clause rules out that construction.

Nor does it seem possible to conclude that "costs of response," "damages," and "claims" are in parallel. Under this construction, a state would be preempted from paying

> compensation for claims for [a)] any costs of response or [b] damages or [c] claims [any of] which may be compensated under this subchapter.

The statute would again be redundant because it would speak of "claims for * * * claims which may be compensated."

d. On the other hand, it seems to us that the parties and the state courts failed to recognize the significantly narrowing effect of the statutory terms "claims" and "compensation." As we have seen, Section 114(c) is not limited in two ways assumed by the parties and the lower courts: it is not restricted to oil and chemical companies taxed under Superfund; it also is not limited to payments that "may be compensated under [Superfund]." But it does not follow that Section 114(c) has a very broad reach. The critical fact is that Section 114(c)'s prohibition *is* restricted to only those payments made as "compensation for claims."

The term "claim" is defined in Superfund as "a demand in writing for a sum certain" (42 U.S.C. 9601(4)). The term "compensation" is not defined by the statute but is customarily used to mean "indemnification; * * * making whole; giving an equivalent or substitute of equal value [;] [t]hat which is necessary to restore an injured party to his former position." *Black's Law Dictionary* 256 (5th ed. 1979); see also *Webster's Third New International Dictionary* 463 (1976). The terms "claim" and "compensation" as used in Superfund are related; Superfund defines a "claimant" as "any person who presents a *claim* for *compensation* under this chapter" (42 U.S.C. 9601(5) (emphasis added)).

From these definitions, it follows, in our view, that the critical phrase "compensation for claims" in Section 114(c) refers only to demands made upon a state by

third parties seeking to be made whole. The term does not encompass expenditures or payments made by a state in the absence of such a demand. For example, if a state simply decides to spend fund money—*e.g.*, to remove or treat hazardous wastes—it is not paying "compensation" for a "claim." No "written demand for a sum certain" will have been presented. And in many cases no one will be indemnified or made whole.

Other provisions of Superfund strongly support this interpretation. In Section 111(a), 42 U.S.C. 9611(a), the key portion of the statute specifying the four permitted uses of Superfund money, Congress drew precisely this distinction between payment of "claims" and other government expenditures. Two of the permitted uses of Superfund money are described as the "payment" of "claim[s]." § 111(a)(2) and (3), 42 U.S.C. 9611(a)(2) and (3). Both involve written demands either for damages or reimbursement for moneys spent in response (§ 111(a)(2) and (3), 42 U.S.C. 9611(a)(2) and (3)). The other two permitted uses of Superfund money involve expenditures made without such a written demand for damages or reimbursement. § 111(a)(1), (4), 42 U.S.C. 9611(a)(1) and (4). These are "payment of governmental response costs" (§ 111(a)(1), 42 U.S.C. 9611(a)(1))—*i.e.*, payments made for the cleanup or removal of hazardous substances or for remedial action—and payments for necessary studies, investigations, equipment, and employee health (§ 111(a)(4), 42 U.S.C. 9611(a)(4)). Congress pointedly did not describe these expenditures as "claims."

Superfund also contains a detailed section on "claims procedure[s]." § 112, 42 U.S.C. 9612. These procedures clearly apply only to "claims" as described above and not to removal or remedial actions undertaken by the federal government itself.

2. The legislative history of Superfund unmistakably points to the same interpretation. This history shows that the key statutory phrase "compensation for claims" was

used in its customary, literal sense and not as a synonym for broader terms such as payments or expenditures.

The bill ultimately enacted as Superfund (S. 1480, 96th Cong., 1st Sess. (1979) (1 *Leg. Hist.* 155-192))[7] had no preemption provision as originally introduced. On the contrary, Section 8 expressly disclaimed any preemptive intent. The preemption provision enacted as Section 114(c) can be traced to two related bills.

a. The first (H.R. 85, 96th Cong., 1st Sess. (1979) (2 *Leg. Hist.* 474-524)) dealt exclusively with oil spills. Cast in the mold of other hazardous substances bills introduced in the 96th Congress, H.R. 85 imposed strict liability for spills (§ 104(a)), created a fund financed by a fee on oil (§ 102), and permitted injured parties to make "claims" against the fund for a broad range of economic damages (§ 103(a)). This scheme of liability and compensation was intended to be exclusive and to preempt the existing patchwork of state statutes. Unclear and often conflicting state laws were thought to threaten the insurability and efficient operation of interstate carriers. See 2 *Leg. Hist.* 469-470 (remarks of Rep. Biaggi, the sponsor), 528-529 (report of Merchant Marine and Fisheries Committee). Accordingly, Section 110(a)(2) provided that "no person may be required to contribute to any [other] fund, the purpose of which is to compensate for" the losses claimable against the federal fund (2 *Leg. Hist.* 513). H.R. 85 was passed by the House but died in the Senate (1 *Leg. Hist.* VI; 2 *Leg. Hist.* 1015).

The legislative history of H.R. 85 makes abundantly clear that this provision did not apply broadly to state payments or expenditures relating to oil spills, but was limited to the payment of victims' claims for "compensation." The House Merchant Marine and Fisheries Committee wrote (2 *Leg. Hist.* 532 (emphasis added)):

> States may establish a fund to purchase pollution abatement equipment, or a fund for the prevention,

---

[7] 1 *Leg. Hist.* stands for volume one of the legislative history compiled by the Congressional Research Service. See note 6, *supra*.

> detection, or observation of pollution, such as environmental monitoring or research programs. * * * The States would be prohibited only from duplicating the basic purposes of the Federal fund; that is, to provide a source of *compensation for those who have been victimized by oil pollution* and the related evidence of financial responsibility.

See also 2 *Leg. Hist.* 562 ("[N]o one may be required to contribute to any other fund" the purpose of which is "to compensate those who suffer one or more of the [specified] economic losses."); 2 *Leg. Hist.* 621-622 (report of House Comm. on Public Works and Transportation).

This point was emphasized even more strongly during a colloquy between the bill's sponsor, Representative Biaggi, and Representative Florio of New Jersey, who expressed concern about the bill's possible effect on New Jersey's Spill Fund (2 *Leg. Hist.* 904 (emphasis added)):

> MR. BIAGGI: * * * The purpose [of section 110] is to prohibit States from creating duplicate funds to pay damage compensable under H.R. 85.
>
> MR. FLORIO: However, there is no such preemption of a State's ability to collect such taxes or fees *for other costs associated with spills and discharges of oils and hazardous substances that are not compensable damages as defined in this legislation* or that do not occur in or threaten the navigable waters of the United States.
>
> MR. BIAGGI: The gentleman is correct.
>
> MR. FLORIO: There is nothing in the language or intent of H.R. 85, section 110 or elsewhere in the bill which would prohibit a State from *responding to a spill or discharge* either under agreement with the Secretary, at the direction of the Federal on-scene coordinator or in the absence of timely response by any other party. * * *.
>
> MR. BIAGGI: Yes, the gentleman understands the intent of the bill correctly.

Representative Biaggi reiterated (2 *Leg. Hist.* 905 (emphasis added)) that a "State cannot receive a fee or a tax on oil if that fee or tax is to go into a fund and the

fund is for *the purpose of paying oilspill damage claims*" but that a State was not prohibited "from imposing fees or taxes *for other purposes* connected with oil spills." See also 2 *Leg. Hist.* 906 (remarks of Reps. Snyder and Biaggi); 2 *Leg. Hist.* 919-920 (remarks of Rep. Livingston); 2 *Leg. Hist.* 924 (remarks of Rep. Snyder).

b. The second related bill was the Administration's proposal, S. 1341, 96th Cong., 1st Sess. (1979) (3 *Leg. Hist.* 24-60), which dealt both with spills of hazardous substances and hazardous waste disposal sites. For spills, it established a system of notification, emergency response, liability, and economic compensation. For disposal sites, it established essentially the same program but without compensation. The bill created a fund financed by an excise tax on petrochemical feedstocks and specified chemicals (§ 606) and allowed parties injured by spills to file "claims for damages" for a broad range of "economic loss[es]" (§ 607). This compensation scheme, like H.R. 85's, was intended to be comprehensive and exclusive within its limited sphere (1 *Leg. Hist.* 124). Accordingly, the bill prohibited suits in federal or state court "for an economic loss or cost * * *, a claim for which may be asserted under [the bill]." (§ 612(a)(1). 3 *Leg. Hist.* 57). In addition, the bill provided that "no person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss or cost" (§ 612(a)(2)).

c. S. 1480, which became Superfund, resembled these bills in many particulars while differing in others. It imposed strict liability for the release of hazardous substances (§ 4), created a fund financed in part by a fee on hazardous substances and wastes (§ 5), and authorized the use of fund money both for government removal and remedial actions and for the "payment of any claim for costs of removal or damages" that could not be recovered from the responsible party (§ 6). The bill was later altered to permit payment of a long list of enumerated "claims" (1 *Leg. Hist.* 225-226).

As previously noted, S. 1480 originally lacked a preemption provision. Numerous amendments adding such a provision were unsuccessfully attempted. Several resembled Section 114(c) and the preemption provisions in H.R. 85 and S. 1341.[8] For example, Amendment No. 1958 provided (3 *Leg. Hist.* 107):

> No person may be required to contribute to any fund, by any Federal, State, or other law, the purpose of which is to pay compensation for any loss which may be compensated under this title.

Similarly, Amendment No. 2387 stated (3 *Leg. Hist.* 185):

> (1) No action may be brought in any court of the United States, or of any State or political subdivision thereof, for costs or damages for which a claim may be asserted under this Act, and
>
> (2) no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for such costs or damages * * *.

On November 18, 1980, S. 1480 was reported out of committee. The ensuing events have been summarized by the Congressional Research Service (1 *Leg. Hist.* VII):

> In the meantime, of course, the national elections had taken place on November 4 and subsequent events during the lame-duck session were colored by the fact that the Republicans would become the majority party in the Senate in 1981. It was not at all clear, however, what impact that would have on the Superfund legislation.
>
> As reported, S. 1480 called for creation of a $4.1 billion fund. On November 14, the likely incoming chairman of the Environment Committee, Senator Stafford, announced that he and committee chairman Randolph were introducing a $2.7 billion compromise (Amendment No. 2622.) But when it was called to the Senate floor on November 20, objection to its consideration was voiced. A motion to table the bill

[8] One proposed amendment (No. 1965) introduced by Senator Gravel of Alaska would have provided the scope of preemption sought by appellants (see 3 *Leg. Hist.* 142). It was not adopted.

> (which would have killed it) lost by 29-50. It was then withdrawn and new concessions were made by its sponsors; the fund was cut to $1.6 billion and the provision compensating victims of environmental disasters for their medical expenses was deleted (Amendment No. 2631). On November 24, this version passed by a 78-9 vote, its provisions were substituted for the language of H.R. 7020, and the resulting bill was returned to the House.
>
> * * * * The House agreed to the Senate amendments on December 3 by a 274-94 vote, and the President signed it into law on December 11, 1980.

Among the changes made by the eleventh-hour floor amendment was the addition of Section 114(c). Whatever grounds for uncertainty may exist may exist in other respects as to the intended reach of this provision, there can be no real doubt that the key statutory phrase "compensation for claims" was used in its customary, literal sense, just as the terms "claim" and "compensation" had been employed in the predecessor bills and amendments. The most elucidating portion of the debate was the colloquy between Senator Bradley of New Jersey, who was concerned about the survival of New Jersey's Spill Fund, and the Committee Chairman, Senator Jennings Randolph. Neither Senator Bradley's questions nor Senator Randolph's answers were extemporaneous; indeed, their exchange was almost a verbatim duplication of that between Representatives Florio and Biaggi regarding H.R. 85. See page 17, *supra*. The Senators' colloquy was as follows (1 *Leg. Hist.* 731-732 (emphasis added)):

> MR. BRADLEY: * * * Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund *for the purpose of reimbursing claims already provided for in this legislation?*
>
> MR. RANDOLPH: Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay *damage compensable under this bill.*
>
> MR. BRADLEY: *However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are*

not compensable damages as defined in this legislation.

MR. RANDOLPH: The Senator is correct.

MR. BRADLEY: There is nothing in the language or intent of this bill which would prohibit a State from *responding to a release* either under agreement with the Secretary, at the direction of the Federal on-scene coordinator or in the absence of timely response by any other party. In fact, the Federal Government's cleanup and containment capability is viewed as something of an appeal of last resort in the absence of any other adequate and timely response, if my understanding is correct.

MR. RANDOLPH: Yes, the Senator understands the intent of the bill correctly. * * *

After S. 1480 was passed by the Senate and its language was substituted for that in the House bill (H.R. 7020, 96th Cong., 1st Sess. (1979), Representative Florio, the sponsor of the House bill, observed (1 *Leg. Hist.* 780):

> Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create duplicate funds *to pay damages compensable under this bill, there is no preemption of the State's ability to collect taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.* It is also intended that State funds can be used to provide the required 10-percent State match.

See also 1 *Leg. Hist.* 777 (remarks of Rep. Florio).

d. In view of this history, as well as the plain meaning of the statutory language, we do not think it is possible to argue that Section 114(c) preempts anything other than payments made in response to formal demands upon a state fund by parties seeking to be made whole for damages[9] or costs attributable to the release of a

[9] The term "damages" is defined in Section 101(6) of Superfund, 42 U.S.C. 9601(6) as "damages for injury or loss of natural resources."

hazardous substance. Expenditures made by a state for any other purposes, including removal or remedial action, whether undertaken alone or in cooperation with the federal government, are not preempted. Thus, a state's payment of its 10% share of the cost of remedial action undertaken pursuant to Superfund is not affected by Section 114(c).[10] The federal government does not obtain this money from the state by means of a "written demand for a sum certain." Nor is the federal government seeking to be "compensated" or "made whole." On the contrary, the state must agree to provide this money before any expenditures are made (§ 104(c)(3), 42 U.S.C. 9604(c)(3)). The money does not represent "compensation" for the federal government but rather the state's share in the "cooperative" remedial undertaking (§ 104(c)(3), 42 U.S.C. 9604(c)(3)).[11]

3. The remaining question is the application of Section 114(c), as properly construed, to the New Jersey Spill Fund. As noted, Spill Fund money may be used for five purposes: (1) the removal or cleanup by the state of hazardous substances (N.J. Stat. Ann. 58:10-23.11*o*(1) § 58:10-23.11f); (2) damages sustained and cleanup costs incurred by other parties as a result of the discharge of hazardous substances (N.J. Stat. Ann. § 58:10-23.11*o*(2) § 58:10-23.11g); (3) research on the effects of spills and improved cleanup operations (N.J. Stat. Ann. § 58:10-23.11*o*(3)); (4) administrative and personnel costs (N.J. Stat. Ann. § 58:10-23.11*o*(4)); and (5) research on ocean pollution (N.J. Stat. Ann. § 58:10-23.11*o*(5)).

[10] See note 3, *supra*. See 1 *Leg. Hist.* 733:

> MR. BRADLEY: Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?
>
> MR. RANDOLPH: That is correct.

See also 1 *Leg. Hist.* 780 (remarks of Rep. Florio); page 22, *supra*.

[11] Bills favorably reported by the responsible House and Senate committees have proposed deletion of Section 114(c). See H.R. Rep. 98-890, 98th Cong., 2d Sess. Pt. 1, at 58-59 (1984). S. Rep. 99-11, 99th Cong., 1st Sess. 59-60 (1985).

One of these uses—the payment of other parties' damages and cleanup costs—appears to constitute the payment of "compensation for claims" within the meaning of Section 114(c) of Superfund. And such payments may fall within the statutory definitions of "costs of response" (*i.e.*, removal or remedial action)[12] or "damages."[13] The remaining four uses of Spill Fund money appear to be permitted.[14]

Because one of the five uses of Spill Fund money appears to be partially prohibited by Section 114(c), appellants are presumably entitled to a declaratory judgment that Spill Fund is preempted to that limited extent. Whether appellants are entitled to any other relief, such as invalidation of the entire tax on non-severability grounds or the return of tax monies, should be left for the state courts on remand.

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[12] § 101(23)-(25), 42 U.S.C. 9601 (23-25).

[13] § 101(6), 42 U.S.C. 9601(6). As noted above (see note 9, *supra*), the term "damages" under Superfund means natural re- note 9, *supra*), "damages" under Superfund means natural resource damages. The New Jersey Spill Fund Act authorizes payment of claims for a wider array of damages. In our view, Section 114(c) preempts use of Spill Fund money only for the payment of "damages" as defined in Superfund, *i.e.*, natural resource damages.

[14] According to New Jersey's submission (Motion to Dismiss or Affirm 10 n.*), since the enactment of Superfund, no Spill Fund money has been spent to pay third-party claims for damages or cleanup costs.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted. The judgment of the Supreme Court of New Jersey should be reversed in part and the case remanded for further proceedings.

Respectfully submitted.

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No. 84-978

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EXXON CORPORATION, et al.,
Appellants,

VS.

ROBERT HUNT, ADMINISTRATOR OF
NEW JERSEY SPILL COMPENSATION FUND, et al.,
Appellees.

On Appeal from the Supreme Court of the State of New Jersey

AMICI CURIAE BRIEF OF STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL THE STATES OF CONNECTICUT, OHIO, MAINE, NEW HAMPSHIRE, NEW YORK, TEXAS AND VERMONT

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Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI CURIAE

Over the last decade, the nation has had its attention forcibly drawn to the risks associated with hazardous substances and wastes. Environmental contamination at Love Canal in New York, Times Beach in Missouri, and Stringfellow Acid Pits in California raised many concerns about the extent of toxic contamination in our country. Those concerns have been elevated into fears that the nation is aware of only the tip of the toxics iceberg, and that hazardous waste dangers, like the cancer they can cause, are multiplying at a seemingly uncontrollable rate.

In response, Congress passed the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA).[1] CERCLA created the federal Superfund to control releases of hazardous substances nationwide. Even as CERCLA was enacted, Congress realized that the federal Superfund would be adequate to address only a portion of the most seriously contaminated sites. Congress, therefore, relied upon the states to assume a substantial role in the mitigation of the nation's hazardous substance sites.

As of this writing, the United States' ability to collect taxes to support the federal Superfund will expire on September 30, 1985. Even assuming that Congress reauthorizes a new authority to tax after that date thereby maintaining the viability of Superfund, the states undoubtedly will be required to assume financial responsibility for hazardous substance cleanups. It is critical for this Court

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[1] "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., enacted by Congress on December 11, 1980. "Superfund" is the Hazardous Substance Response Fund established by section 221 of CERCLA, 42 U.S.C. § 9631. "Spill Fund" means the New Jersey Spill Compensation Fund established pursuant to N.J. Stat. Ann. section 58:10-23.11i (West 1982) as part of the New Jersey Spill Compensation and Control Act. N.J. Stat. Ann. Section 58:10-23.11 et. seq. (West 1982) enacted on January 6, 1977 and thereafter amended.

to affirm the ability of the states to raise funds to support those cleanup efforts.

In 1981 the State of California created a state fund to complement and supplement the federal Superfund.[2] This state fund, known as the Hazardous Substance Account (HSA)[3] is generated primarily by a tax on persons who dispose of hazardous waste within the State of California.[4]

As will be explained below, the tax to support the California program is different from the tax used to support both the New Jersey Spill Fund and the federal Superfund, however, the authorized uses of the HSA are similar.[5] HSA, upon appropriation by the State Legislature, may fund administrative costs, hazardous substance response equipment costs, costs of preparation for response to a hazardous substance release, removal and remedial action costs incurred by the State,[6] costs of certain specified studies, and the state share of remedial action costs mandated pursuant to section 104(c)(3) of CERCLA, 42 U.S.C. § 9604(c)(3). Money in HSA may also be appropriated by the

[2] The Hazardous Substance Account Act, California Health and Safety Code sections 25300-25382 (West 1984 & Supp. 1985).

[3] California Health and Safety Code section 25330. This account is administered by the director of the California Department of Health Services.

[4] See generally California Health and Safety Code section 25340-25348. The HSA is funded by a tax imposed annually upon persons who dispose of hazardous and extremely hazardous waste over a specified amount in the state. The tax rate is based upon the total amount in tons of waste disposed of during a one-year period. See California Health and Safety Code section 25347.

[5] See California Health and Safety Code section 25351, which requires that the expenditures from HSA be consistent with section 114(c) of CERCLA, 42 U.S.C. § 9614(c).

[6] The State of California generally adopts the definitions in CERCLA for "remedy or remedial action" (42 U.S.C. § 9601(24)) and "remove or removal" (42 U.S.C. § 9601(23)). See California Health and Safety Code sections 25322, 25323.

state legislature on a site specific basis for the costs of restoring, rehabilitating, or replacing natural resources, and of assessing short-term and long-term injuries to natural resources to the extent such costs are not reimbursed pursuant to CERCLA.[7] Finally, HSA may be used to compensate victims for uninsured out-of-pocket medical expenses and uninsured actual lost wages, business income, or injury to a person's property,[8] compensation provisions which have no equivalent under CERCLA.

On November 6, 1984, the electorate of the State of California passed the Hazardous Substance Cleanup Bond Act of 1984.[9] As a consequence, the state hazardous substance account was increased to fifteen million dollars ($15,000,000) annually with five million dollars ($5,000,000) from the account dedicated to repay in part the principal of, and interest on, the bonds sold under the Hazardous Substance Cleanup Bond Act.

[7] See California Health and Safety Code section 25352.

[8] See generally California Health and Safety Code sections 25370-25382.

[9] That act empowered the sale of general obligation bonds to create a Hazardous Substance Cleanup Fund of up to one hundred million dollars ($100,000,000) to pay (1) the state share of costs of removal and remedial action pursuant to section 104(c)(3) of CERCLA, and (2) all costs of removal or remedial action on sites on the State Priority Ranking List (SPRL). (See California Health and Safety Code Sections 25385-25386.6)

In order to spend HSA funds and/or bond funds for removal or remedial actions at a site, the state must first place this site on the SPRL. (See California Health and Safety Code section 25385.6.) There are currently 222 sites on the SPRL. Of those sites, 53 are also listed or proposed to be listed on the National Priority List. The State of California has executed three cooperative agreements and three contracts with the United States Environmental Protection Agency pursuant to Section 104 of the CERCLA, 42 U.S.C. § 9604 for work on the NPL sites in California.

Other amici joining in this brief administer similar programs for the cleanup of hazardous substance sites.[10] These states are committed to expeditiously cleaning up sites contaminated by hazardous substances to protect the public health and safety of their citizens. A broad ruling in favor of appellants' position could eliminate or deeply erode a state's ability to tax hazardous waste to support its cleanup funds and thereby jeopardize its ability to respond to hazardous substance contamination problems.

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[10] The State of New York also maintains a hazardous waste remedial fund created pursuant to New York State Finance Law, Section 97-b. The Fund is made up of monies collected pursuant to special assessments on generators of hazardous waste and monies collected from penalties against violators of certain sections of the New York State Environmental Conservation Law. To date, New York has identified approximately 1400 hazardous waste sites within the state, only a fraction of which are being addressed by the federal government with Superfund money. The existence of the hazardous waste remedial fund has enabled New York to begin a major program of site investigation and remediation. Without the State fund, New York would not be able to adequately address its hazardous waste problem.

The State of New Hampshire manages the New Hampshire Hazardous Waste Cleanup Fund which was established in 1981. The fund is supported by a fee imposed on industry based upon the amount of hazardous waste generated in the state. (N.H. Rev. Stat. Ann. 147B:8(I) (Supp. 1983).) The fund was established for the broad purpose of providing for the adequate and safe containment of and cleanup of hazardous waste sites in the State of New Hampshire. In 1985, the New Hampshire Legislature restricted the use of the fund to sites which do not qualify for CERCLA funds. (N.H. Rev. Stat. Ann. 147B:6(I) (Supp. 1983) as amended by Chap. 346 of the 1985 N.H. Laws). State matching funds for CERCLA are derived from the sale of a special bond (Chap. 346:4 of the 1985 N.H. laws). No claims payable to third parties out of the Hazardous Waste Cleanup Fund are authorized. (N.H. Rev. Stat. Ann. 147-B:6(II) (Supp. 1983).)

The State of Vermont manages a response fund pursuant to 32 V.Stat. Ann. Chap. 237 "Tax on Hazardous Waste Generation."

SUMMARY OF ARGUMENT

When Congress adopted CERCLA, it set forth a comprehensive scheme designed to guide federal and state responses against the uncontrolled releases of hazardous substances to protect public health and welfare and the environment.

CERCLA established a two-pronged approach for the accelerated cleanup of hazardous substances throughout the nation.

First, CERCLA established a federal fund to be used directly by the United States Environmental Protection Agency (EPA) to take cleanup actions at the most seriously contaminated hazardous substance sites in the nation, and to make other specified payments for claims to the Superfund. The large majority of Superfund expenditures require a specified contribution by a state in order to commence cleanup of a particular site.

Second, CERCLA created liability standards for certain categories of parties responsible for hazardous substance contamination and established a cause of action for recovery of abatement costs from those parties. In so doing, Congress created a powerful mechanism for states and the federal government to rapidly expend public funds to protect the public health and welfare and the environment with the expectation of eventually recovering those costs from responsible parties.

In creating this approach, Congress clearly looked to the states to provide substantial funds to undertake appropriate response actions. State funding is necessary to provide the state share required for federal Superfund expenditures at a specified site. The states also are relied upon to fund response action at sites which may not be addressed with Superfund money. Congress recognized state response funds would be essential to the abatement of hazardous substances because federal Superfund would be inadequate to pay for cleanup at all sites requiring abatement. There is no evidence that Congress desired in any way to limit the ability of states to raise funds for such purposes.

Congress did place a restriction on the use of state funds for other than state response costs. Section 114(c) of CERCLA, 42 U.S.C. § 9614(c) expressly prohibits states from requiring per-

sons to contribute to funds to pay claims for damages or costs of response by third parties or for other compensable items under CERCLA. In creating those categories of limitations, however, Congress intended to preempt state taxation only where the funds raised are to be used to compensate claims already paid for by Superfund. In any event, Congress did not intend to preempt state taxation systems which were not duplicative of the CERCLA system.

We adopt the general reasoning employed by the New Jersey Supreme Court as it enunciated an "actual compensation" test to determine the validity of a state compensation fund. We have recast the court's reasoning, however, in a moderately revised framework.

ARGUMENT
I

THE FORMATION OF STATE CLEANUP FUNDS WAS AN ESSENTIAL ELEMENT OF THE COMPREHENSIVE FEDERAL-STATE SCHEME EMBODIED IN CERCLA

Amici submit that a comprehensive review of CERCLA and its legislative history compels the conclusion that state cleanup funds are permitted and, in fact, are encouraged by the federal legislation.

A. Congress Recognized That States Would Need Their Own Funds To Abate Hazardous Substance Sites

In considering the need for federal legislation to address the problems of improperly managed hazardous waste, Congress observed that:

> "Since enactment of [the Resource Conservation and Recovery Act of 1976], a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as 'the inactive hazardous waste site problem.' The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and Congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem." (H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S. Cong. Ad. News 6120.)

In an effort to address concerns such as those, Congress enacted CERCLA. The legislation established a $1.6 billion Superfund, which is financed primarily by a federal tax on petroleum and specified chemicals. The principal use of the fund is to provide the federal share of public monies for removal[11] or remedial[12] actions directed against releases or threatened releases of hazardous substances to the environment. The remainder of the public monies for remedial measures at a site must be provided by the states in proportions specified by CERCLA. Additionally, Superfund can be used for certain governmental costs and for the payment of two types of claims. (See 42 U.S.C. § 9611.)

As part of the CERCLA legislation, Congress required the amendment of the National Contingency Plan (NCP) created by section 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 to set forth procedures for responding[13] to hazardous substance releases. (See 42 U.S.C. § 9605.) A component of the NCP is the National Priorities List (NPL). (See 42 U.S.C.

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[11] Removal action refers to emergency or crisis measures including "spill containment measures; measures required to warn the public of, and protect it from acute damages; temporary evacuation and housing; [and] activities necessary to close an existing public water supply system." (S.Rep. No. 848, 96th Cong., 2d Sess. 53-54 (1980). *See* 42 U.S.C. § 9601(23).)

[12] Remedial action deals with "those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." (42 U.S.C. § 9601(24).)

[13] See 42 U.S.C. § 9601(25). "Respond" or "response" are generic terms referring to a broad range of actions which mitigate or abate hazardous substance contamination.

§ 9605(8)(B).) The NPL is a list of sites contaminated by hazardous substances which appear to present the most significant threat of harm to human health in the nation. (See 40 C.F.R. § 300.68(a).) Once a site has been placed on the NPL, the federal government may arrange for remedial activities at the site with financing from Superfund. (See 42 U.S.C. § 9604.)

Despite the size of Superfund, Congress was aware that it was inadequate to address every site in the nation requiring cleanup. At the time of CERCLA's passage the EPA, manager of the Superfund, estimated that as many as 30,000 to 50,000 inactive and uncontrolled hazardous waste sites existed in the United States, and estimated that cleanup of the most dangerous sites alone would cost between $13.1 and $22 billion (H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18, 20, (1980), reprinted in 1980 U.S. Cong. Ad. News 6120, 6123). Congress recognized that Superfund would not provide for a sufficient level of funding to handle the cleanup and removal of hazardous waste sites that existed at the time. (See *Exxon v. Hunt*, 481 A.2d 271, 279 (N.J. 1984); see generally 126 Cong. Rec. S/15007 (daily ed. Nov. 24, 1980) remarks of Sen. Stafford; S.Rep. No. 848; 96th Cong., 2d Sess. 17, 71 (1980).) As a consequence, Congress looked to maximize the use of Superfund by requiring supplemental funds from the states for specified actions. In addition, Congress intended to provide enhanced legal authority to the states pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607 to enable them to respond independently to sites which would not be addressed by the limited federal funds. Clearly, in both cases Congress envisioned the creation of state cleanup funds.

1. State Response Funds Are Required For Redmedial Actions Under Section 104 Of CERCLA

State involvement is critical in the initiation of remedial actions under section 104 of CERCLA, 42 U.S.C. § 9604. Section 104(c) of CERCLA prohibits actions unless the state in which the release occurs first enters into a contract or cooperative agreement providing assurances that (1) the state will assure all future maintenance of the removal and remedial action; (2) the state will assure availability of an acceptable hazardous waste

disposal facility, if necessary; and (3) the state will pay either 10 percent of the cost of the remedial action (including all future maintenance) or, in the case of a facility that the state or political subdivision owned at the time of the disposal, at least 50 percent of any sums expended in response to a release at such a facility. (See 47 Fed. Reg. 31186 (1982).) In recognition of the necessity of state contributions for cleanup actions, the states' ability to raise funds for those purposes was intended to be unaffected by the passage of CERCLA. (See 126 Cong. Rec. S14981 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph.))

2. State Response Funds Are Permitted For Response Actions At Sites For Which Federal Funds Cannot Or Have Not Been Used

As encouragement for states to undertake remedial actions with their own funds, CERCLA specifically entitled states to initiate cost recovery actions against specified parties for those expenditures. By authorizing state action for cost recovery and natural resources damages, section 107 of CERCLA provides the states with an essential tool to respond to sites which have not been or may never be addressed with Superfund money. (See *New York v. General Electric Company*, 592 F.Supp. 291 (N.D.N.Y. 1984)

In order to recover response costs under Section 107 of CERCLA, the federal or state response action must not be inconsistent with the NCP. The NCP provides a comprehensive guidance for the identification, investigation and remedy of hazardous substance releases. The NCP is the national blueprint detailing on a flexible basis the methods for achieving the goal of CERCLA which is protection of public health and welfare and the environment. It was through the creation of the NCP, not the creation of Superfund, that Congress intended to impose the comprehensive federal-state scheme alleged by appellants. (*New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985.) If the states followed the NCP then cleanup actions would follow a consistent, nationwide pattern. By providing the cost recovery component in CERCLA, Congress set forth a strong incentive—a carrot rather than

a stick—for the states to implement the cleanup guidelines of the NCP.

The NCP not only provides an overall methodology on how best to clean up sites; it embodies the Congressional reliance on state cleanup actions. Through the NCP, EPA has interpreted CERCLA to provide states with a substantial and oftentimes independent role for undertaking hazardous substance response actions.

As an example of this federal reliance, a major new section of the NCP was added in subpart F (40 C.F.R. §§ 300.61-300.71). This subpart established seven phases of response, from discovery of the release of hazardous substances through various levels of response to documentation of response for cost recovery purposes. The phases are designed to give response personnel a decision-making framework for undertaking response action. (See 47 Fed. Reg. 31198 (1982).) As part of this action, EPA added a new 40 C.F.R. § 300.62 to describe the State role under CERCLA. EPA stated that it "decided to add this section to emphasize the ability of the States to undertake responsibility for much of the response detailed in Subpart F." (47 Fed. Reg. 31199 (1982).)

Furthermore, the NCP specifically provides that:

> "States are encouraged to use State authorities to compel potentially responsible parties to undertake response actions, or to *themselves undertake response actions which are not eligible for Federal funding.*" (Emphasis added.) (40 C.F.R. section 300.24(c).)

The court should afford great weight to an agency's interpretation of its governing statute. Within the past year, this Court twice has applied this fundamental maxim of statutory construction in upholding interpretations by EPA of federal environmental statutes. See *Chemical Manufacturer's Association v. National Resources Defense Council,* ____ U.S. ____, 105 S.Ct. 1102 (1985), *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* ____ U.S. ____, 104 S.Ct. 2778 (1984).[14]

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[14] While reviewing a challenge to EPA's position regarding the granting of variances from pollution discharge requirement established under the federal Clean Water Act (33 U.S.C. § 1251 et seq.) this Court in *Chemical Manufacturers Assoc.* stated:

> "This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this 'very complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." [105 S.Ct. at 1108.]

The ability of the states to pursue a cost recovery action under 107(a)(4)(A) of CERCLA is separate and independent of the requirements of any other CERCLA sections, including section 104. (See *United States v. Northeastern Pharmaceutical & Chemical Company,* 579 F.Supp. 823 (W.D. Mo. 1984); *United States v. Reilly Tar & Chemical Company,* 546 F.Supp. 1100, 1118 (D. Minn. 1982).) CERCLA, therefore, authorizes state actions to recover costs even where such costs were not incurred as part of a contract or cooperative agreement pursuant to section 104 of CERCLA.

By requiring national guidelines for response actions and providing clear legal authority to the states to recover the costs of their response actions, Congress envisioned the broad use of State-created response funds. The use of such funds may be independent of federal funds, without EPA supervision and at sites not on the National Priorities List and still be consistent with the aims of Congress. (See *New York v. Shore Realty,* 759 F.2d 1032, 1046-1047 (2d. Cir. 1985); *New York v. General Electric,* 592 F.Supp. 291, 303-304 (N.D.N.Y. 1984).)

B. Exxon Fundamentally Misunderstands The Federal-State Relationship Contemplated by CERCLA

While appellants recognize that CERCLA envisions a coordinated federal-state scheme to address hazardous substance problems, they misapprehend the full nature of the response scheme. They unduly restrict their focus to the creation of the Superfund and the means by which it is spent in conjunction with matching state contributions. In doing so, appellants erroneously imply that states can only spend response funds on National

Priority List sites and even then only in the context of section 104 of CERCLA. This is patently incorrect.[15]

Nothing in CERCLA supports appellants' contention that states cannot clean up sites on the NPL entirely with state funds if they so desire. States can certainly refuse to enter into cooperative agreements or contracts with EPA as called for by section 104 of CERCLA. In such a situation, EPA would be unable to proceed with a remedial action. Whether a site on the NPL

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[15] Appellants' confusion over the purposes of CERCLA is evident in their discussion of the role of state funds to pursue cleanup (App. Br. at 20, 21). On the one hand they state that:

> "[i]f states were permitted to create their own special funds for the purpose of financing cleanup at Superfund-eligible sites within the State, they would circumvent the coordinated State-federal procedure and priorities of CERCLA—for example, by relying upon their own funds to pursue cleanup through their own unsupervised procedures and refusing to enter into the cooperative agreements with EPA required by Sections 104(c) and (d) as a precondition to governmental action under Section 104."

On the other hand they state that "Congress did not prohibit the States from using general revenues . . . to create such funds for cleanup." Thus, according to appellants, Congress intended to preclude independent state actions—to require coordinated federal-state procedure—but only in instances involving "special" state funds, not in cases involving "general" funds. The alleged problems described in their first statement regarding State-controlled funds are cured by their second statement. If their first statement were correct, the source of the funds would be irrelevant since it is States' ability to have their own cleanup funds which is the perceived problem.

Furthermore, appellants' contend that if states were limited to general revenues to finance their own cleanup efforts they would have a greater incentive to "participate in CERCLA" and to coordinate their actions with the federal government. While it is unclear what appellants mean by "participate in CERCLA" it makes no sense that the source of state cleanup funds should affect the State's desire to enter into cooperative agreements or contracts pursuant to section 104 of CERCLA. The fact that section 104 provides for federal funding of up to 90% of specified remedial costs on NPL sites acts as a powerful incentive for states to work with EPA at sites eligible for federal funding irrespective of the source of state funds for the state share.

becomes the subject of a publicly-financed remedial action is largely dependent on whether the state, not EPA, can contribute the necessary remedial share and provide other specified assurances. The New Jersey Supreme Court correctly noted that the underlying scheme of Superfund is one that "allows, but does not require, cooperation of the federal and state regimes." (*Exxon v. Hunt,* 481 A.2d at 280, citing the Tax Court, 4 N.J. Tax at 315.)

The United States Court of Appeals, Second Circuit also has observed that:

> "Congress did not intend listing on the NPL to be a prerequisite to all response actions. Neither the earlier House nor Senate version included the NPL [National Priorities List] in the NCP [National Contingency Plan] [citations omitted]; although the Senate version limited joint federal-state responses to sites on the NPL [citations omitted]. It is also instructive to note that the Senate Report described the NPL as serving 'primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant *remedial actions*.' (emphasis added). In reviewing the changes made by the compromise, no one mentioned that NPL listing would be a requirement for removal action or even a general requirement under the NCP." (*New York v. Shore Realty Corp.,* 759 F.2d 1032, 1047 (2d Cir. 1985.)

Appellants further contend that any site on the NPL can be cleaned up with public funds only if federal Superfund money is spent on the site and that to the extent that state funds are required to initiate a remedial action at the site, those funds can only be from general revenue sources. This position ignores Congress' recognition that a federal Superfund would not be able to address all sites that require remedial action nor even address the limited number of sites designated on the National Priorities List.

Appellants argue that the states are barred by CERCLA from having any special state funds whose purpose is to clean up "Superfund-eligible" sites. Nowhere in its brief, however, has appellant attempted to articulate what a Superfund-eligible site is.

Appellant has avoided definition because to do so would highlight the fallacies of its argument.

Assuming arguendo that such a definition is possible, a "Superfund-eligible" site could refer to any site which is, or may be on the NPL. The first NPL was proposed by EPA on December 30, 1982 (see 47 Fed. Reg. 58476 (1982)), over two years after the passage of CERCLA. The first final NPL was issued as a rule in September 1983 and included 406 sites (see 48 Fed. Reg. 40658 (1983)). The NPL is required to be revised at least once annually. At present 538 sites are on the list and 248 additional sites are proposed for inclusion. It is estimated that, on the basis of its current criteria, between 1,400 and 2,200 sites will ultimately be added to the NPL.[16] Any site in the United States which has suffered a release of hazardous substances to the environment has the potential to be added to the NPL. If all such sites are "Superfund-eligible," then no state could create funds to respond to those releases.

Even if actual listing on the NPL is the criteria for "superfund-eligibility," there are problems in application that Congress could not have intended. First, the delay in promulgating the NPL would have prevented any site action for almost three years. Second, the NPL is a dynamic document and will undoubtedly include new sites. How will a state know whether a site which is currently not on the NPL eventually be included? Under the theory advanced by appellants the jeopardy to a state-financed cleanup is obvious. A state could be using its funds to address a site not on the NPL at the time and, therefore, not eligible for federal funding. As soon as the site was included on the list, the state would be required to cease using its own funds on the site until it entered into a cooperative agreement or contract with EPA pursuant to section 104 of CERCLA. EPA, however, while listing the site on the NPL, may not have any federal funds currently available to devote to the site. Thus, ironically, where some work could have taken place on the site, it would now be

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[16] Letter to James Florio from United States General Accounting Office, *Status of EPA's Remedial Cleanup Efforts*, March 20, 1985.

barred. In short, the goal of CERCLA—that the health and welfare be protected—would be stymied.

Because the logical outcome of appellant's theory contravenes the primary goal of CERCLA it should be rejected in total. State cleanup funds were not barred by CERCLA; they were, in fact, counted upon to address hazardous substance problems that could not or would not be remedied with federal monies.

II

CERCLA DOES NOT PREEMPT STATE FUNDS WHICH ARE USED FOR RESPONSE ACTIONS

Appellants erroneously argue that section 114(c) of CERCLA, 42 U.S.C. § 9614(c) preempts special State funds which finance any cleanup costs or damages which are eligible for, though never actually compensated by, federal Superfund. Appellants err because they ignore the plain language of section 114(c) and its legislative history which provides for State funding of a broad range of activities including response actions at sites both on and off the NPL.

A. Only Those State Funds Which Pay "Claims For Compensation" Are Subject to the Section 114(c) Test For Preemption

1. The Plain Language of Section 114(c) Prohibits Only A Limited Class Of State Activities

As required by the general principles of statutory construction and federal preemption, the starting point for interpreting a statute is with the words of the statute itself. (See *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 107, 108, (1980).) Section 114(c) states in pertinent part:

> "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter."

On its face, section 114(c) expressly prohibits two categories of uses for which state funds could not be used.[17] The first is "to pay compensation for claims of any costs of response or damages." The second is to pay compensation for ". . . claims which may be compensated under this subchapter."

There is a definite limitation on the reach of this prohibition. The term "compensation for claims" has a narrowing effect so that many state uses of its own funds are not affected. The preemption set forth in section 114(c) is for a very limited category of state activities.

The term "claim" is defined in Superfund as a "demand in writing for a sum certain" (42 U.S.C. § 9601 (4)). The term "compensation" is not defined by the statute but is customarily used to mean "indemnification; . . . making whole; giving an equivalent or substitute of equal value[;] [t]hat which is necessary to restore an injured party to his former position." *Black's Law Dictionary* 256 (5th Ed. 1979); see also *Webster's Third New International Dictionary* 463 (1976). The terms "claim" and "compensation" as used in Superfund are related; Superfund defines a "claimant" as any person who presents a *claim* for *compensation* under this chapter. (42 U.S.C. § 9601(5) (emphasis added).)

Elsewhere in CERCLA, Congress drew a distinction between "compensation for claims" and other types of government expenditures for removal or remedial action. In section 111(a) of

[17] The Solicitor General of the United States submitted an amicus curiae brief which addressed whether this Court should note probable jurisdiction. In that brief, the Solicitor General took a different position from either of the parties or the New Jersey Supreme Court. He argued that there was a preemptive purpose to section 114(c) but that it was limited to "claims for compensation" only. Under his analysis the payment by a State fund of cleanup expenses incurred by the state is permissible under section 114(c) since it is not "compensation" for a "claim" as those terms are used in CERCLA. The Solicitor General declined to adopt the "actual compensation test" articulated by the New Jersey Supreme Court. Our initial argument borrows heavily from the Solicitor General's brief.

CERCLA, 42 U.S.C. § 9611(a), there are four specified uses of Superfund. Two of the permitted uses of Superfund money are described as the "payment" of "claim[s]." (Sections 111(a)(2) and (3), 42 U.S.C. §§ 9611(a)(2) and (3).) Both involve written demands either for damages or reimbursement for monies spent in response (Sections 111(a)(2) and (3), 42 U.S.C. §§ 9611(a)(2) and (3)). The other two permitted uses of Superfund money involve expenditures made without such a written demand for damages or reimbursement. (Sections 111(a)(1), (4), 42 U.S.C. §§ 9611(a)(1) and (4).) These are *"payment of governmental response costs"* (Section 111(a)(1), 42 U.S.C. § 9611(a)(1)—*i.e., payments made for the cleanup or removal of hazardous substances or for remedial action—and payments for necessary studies, investigations, equipment, and employee health* (Section 111(a)(4), 42 U.S.C. §§ 9611(a)(4).)

"Claims," therefore, has an express and definite meaning within CERCLA. The term does not have a general, imprecise use nor is it synonymous with costs incurred for a cleanup or response actions undertaken by a federal or state entity.

2. The Legislative History is Consistent With The Plain Language of the Statute

Section 114(c) was inserted as a floor amendment during the waning hours of the Congressional session. As a consequence, there are no committee reports or other legislative documents to demonstrate conclusively the intended use of the provision. The chronological development of the legislative proposals that eventually became CERCLA have been exhaustively detailed by the appellants and appellees.[18] All parties, including the New Jersey Supreme court, have identified as particularly significant the

[18] CERCLA was the product of last-minute compromise between competing House (*H.R. 85,* 96th Cong., 1st Sess. (1979), 126 Cong. Rec. H9, 186-201 (daily ed. Sept. 19, 1980) and *H.R. 7020,* 96th Cong., 2d Sess. (1980), 126 Cong. Rec. H9, 437-48 daily ed. Sept. 23, 1980) and Senate (*S. 1480,* 96th Cong., 1st Sess. (1979), 126 Cong. Rec. S14, 938-48 (daily ed. Nov. 24, 1980)) bills, and carried virtually no direct legislative history.

colloquy between Senator Bradley of New Jersey and Senator Randolph, Chairman of the Environment and Public Works Committee, which preceded the enactment of the bill that became Superfund. (See 126 Cong. Rec. S 14941-15008 (daily ed. Nov. 24, 1980).) The parties recognize that because Senator Randolph was chairman of the committee which reported the Superfund bill to the Senate, as well as floor manager and co-sponsor of the measure, his explanations and commentws with respect to the interpretation of Superfund provisions deserve particular deference. (*Exxon v. Hunt,* 481 A.2d 271, 277 (N.J. 1984); see also *Mastro Plastics Corp. v. National Labor Relations Board,* 350 U.S. 290 (1956); *National Woodwork Manufacturers Assoc. v. National Labor Relations Board* 386 U.S. 612, 740 (1957); *Federal Energy Administration v. Algonquin SNG, Inc.* 426 U.S. 548, 564-567 (1976).)

The discussion between Senator Bradley of New Jersey, who was concerned about the survival of the very state fund addressed in this case, and Senator Randolph provides a strong demonstration that the reach of the preemption clause was intended to be limited to "compensation for claims" as is in the phrase's customary, literal sense. The Senators' discussion was as follows:

> "MR. BRADLEY: * * * Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund *for the purpose of reimbursing claims already provided for in this legislation?*
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> "MR. RANDOLPH: Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay *damage compensable under this bill.*
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> "MR. BRADLEY: *However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.*
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> "MR. RANDOLPH: The Senator is correct.
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> "MR. BRADLEY: There is nothing in the language or intent of this bill which would prohibit a State from *responding to a release* either under agreement with the Secretary, at the direction of the Federal on-scene coordinator or in the absence of timely response by any other party. In fact, the Federal Government's cleanup and containment capability is viewed as something of an appeal of last resort in the absence of any other adequate and timely response, if my understanding is correct.
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> "MR. RANDOLPH: Yes, the Senator understands the intent of the bill correctly. * * *" (Emphasis added; 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980)

After S. 1480 was passed by the Senate and its language was substituted for that in the House bill (H.R. 7020, 96th Cong., 1st Sess. (1979), Representative Florio, the sponsor of the House bill, observed:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create duplicate funds *to pay damages compensable under this bill, there is no preemption of the States's ability to collect taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.* It is also intended that State funds can be used to provide the required 10-percent State match." (1 Library of Congress, Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510,* at 780 (Comm. Print 1983).)

Given this history as well as the plain meaning of the terms we must concur with the Solicitor General that section 114(c) preempts, as a general matter, only a category of payments made in response to formal demands in writing upon a state fund by parties seeking to be made whole for damages or costs or other actions compensable under CERCLA for the release of a hazardous substance.

B. State Funds Which Pay "Compensation For Claims" Are Preempted Only If Federal Superfund Has Actually Paid Compensation For The Same Claim

Thus far, amici have generally adopted the argument of the Solicitor General as to the scope of 114(c) preemption provision. The Solicitor General takes the position that funds used by the states to pay "compensation for claims" which are damages or costs attributable to the release of a hazardous substance or other use which may be compensated, are preempted. The Solicitor General requires no further inquiry into the type of damage or cost which a state fund seeks to reimburse as a claim. The Solicitor General finds that one of the two uses of the New Jersey Spill Fund—the payment of other parties' damages and cleanup costs—constitutes the payment of "compensation for claims" within the meaning of section 114(c) of Superfund.[19]

At this point, amici must depart from the Solicitor General's position. While we believe that section 114(c) clearly preempts, as a category, "compensation for claims" the language is less clear as to the extent of the preemption. The legislative history indicates that Congress intended to prohibit use of funds to pay claims for compensation only to the extent that such claims were already paid for by Superfund. Therefore, we agree with the reasoning of the New Jersey Supreme Court that state funds are not preempted by section 114(c) insofar as the state funds compensate claims that are either not covered or not actually paid under Superfund. Review of the applicable law and relevant legislative history of CERCLA supports this view.

In addressing the question of whether federal law confers a power that is not exercisable by states—the payment of compensation for specified claims—the Supremacy Clause (U.S. Const., art. VI, cl. 2) requires a judicial determination of whether application of state legislation frustrates the full effectiveness of federal law. (See *Perez v. Campbell*, 402 U.S. 637, 657 (1971).) As recently stated in pending hazardous waste litigation:

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[19] We agree with the Solicitor General's observation that the only "damages" which may be affected by section 114(c) are "natural resource damages."

> "Thus, analysis must proceed in two stages: first, an examination of the primary purposes of each of the laws at issue; second, a determination whether state law is an obstacle to the effectuation of federal objectives." (*Matter of Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984), cert. granted, 53 U.S.L. Week 3584 (Feb. 19, 1985).)

Furthermore, as noted by the New Jersey Supreme Court, "it is not a question of 'whether purposes of the two laws are parallel or divergent,' but 'whether both regulations can be enforced without impairing the federal superintendence of the field . . . ' [citation omitted]" (*Exxon v. Hunt*, 481 A.2d 271, 275 (N.J. 1984). Where it argued, as it is in this case, that Congress intended to withdraw a power from a state by enacting a federal scheme, that intention must be explicit. (*Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 272 (3d Cir. 1984).)

In this case, the Congressional intention to prevent the states from using their own funds to pay any compensation for certain specified claims is not explicit.

As described earlier in this brief, the colloquy between Senators Bradley and Randolph demonstrated that section 114(c) was intended to have very limited preemptive effect on existing and future state funds. Furthermore, the discussion also demonstrated that state funds could be used for purposes including the payment of "compensation for claims" that were either not covered or not actually paid under Superfund.

> "MR. RANDOLPH: * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid under the provisions of this bill.
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> * * * * *
>
> "Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a State may make of its money, nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the

purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

"In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

"* * * * *

"MR. BRADLEY: And am I also correct in noting that State funds are preempted *only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?*

"MR. RANDOLPH: That is correct."

(Emphasis added; 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980).)

Senator Randolph's statements, which addressed funds created subsequent to the passage of CERCLA[20] and would enable states to tax to compensate claims not actually compensated under Superfund, comports with a prohibition against double taxation in that states are still prevented from taxing to pay for claims actually financed by the federal government.[21]

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[20] Appellants' suggestion that the reference point for this critical dialogue between Senators Randolph and Bradley were state funds in existence prior to CERCLA is unsupportable. They had finished their discussion of existing funds and were focused on newly financed funds. Furthermore, Senator Bradley would not have noted that "State funds are preempted only for efforts which are in fact paid for by the Federal fund" if he were referring to an existing fund. Such funds would have already received their contributions prior to CERCLA and no tax conflict could have arisen.

[21] Recent comments of the House of Representatives Committee on Energy and Commerce confirm the above conclusion. Its report dated July 16, 1984, addressed the CERCLA's relationship to other law and the then pending bill's (H.R. 5640) repeal of the preemption provision:

> *"The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund.* To avoid any possible misinterpretation of the law which could further restrict the states' efforts to raise the funds necessary to meet their matching share obligation under the program, the legislation repeals the current law's preemption provision in its entirety. [H.R. Rep. No. 890, Part 1, 98th Cong., 2d Sess. 58-59 (1984) (emphasis added).]" See also S. Rep. 99-11, 99th Cong., 1st Sess. 59-60 (1985).
>
> Congress is clearly attempting to clarify its intent in enacting this statute and such attempts should be accorded due consideration.

If Congress had intended section 114(c) to perform the broad preemptive purpose alleged by appellants it would have explicitly drafted that section to do so. For example, Congress could have made section 114(c) read as follows:

> "Except as provided in this chapter, no person may be required to contribute to any fund the purpose of which is to pay for any costs of response or damages or costs which may be compensated under this subchapter."

The insertion of the "compensation for claims" language in section 114(c) was a conscious choice by Congress to ensure that preemption be narrow in scope and not unduly restrict the states' capability to fund response actions.

C. State Funds Used For Any Purpose Not Specified in Section 114(c) Including State Response Costs, Are Not Preempted

Expenditures by states for any purposes other than those expressly restricted by section 114(c) are not preempted.[22] There-

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[22] Appellants arguments against the suggestion that section 114(c) preempts only state funds used to pay third party claims for costs or damages or any other compensable items is unsupported by legislative history or a plain reading of section 114(c).

The first argument apparently assumes that if states can be claimants under CERCLA, they cannot maintain their own special funds. On its face, this argument is unworkable. It is unimportant whether the state can assert a claim against Superfund for specified costs of response taken by the state or damages suffered by the state, and still maintain its own fund to pay third party claims against the state fund. There is no nexus between the payment of the state claim by Superfund and the payment of the third party claim by the state. Senator Randolph

fore, states may establish funds to be used for a broad range of response actions whether undertaken in cooperation with the federal government pursuant to section 104 or alone.

The legislative history reveals a number of additional purposes for which a state can collect taxes for funds to be used when the costs are not compensable under Superfund. (See 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980) (remarks of Sen. Bradley and Sen. Randolph).) States can use their funds to provide an initial response to a hazardous waste release and thereafter seek reim-

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recognized that and characterized it as "a question of bookkeeping rather than a subject or preemption."

The second argument relies upon section 114(b)'s prohibition against double recovery. Nothing however in the Solicitor General's position supports the possibility of a double recovery,

The third argument is that under the New Jersey system, the New Jersey Department of Environmental Protection is compelled by state law to present claims for compensation to an independent state official who is the administrator of the New Jersey spill fund. Appellants suggest that the Solicitor General's argument is tenuous because Congress could not have intended the preemptive effect of Section 114(c) to rely upon the administrative mechanisms adopted by the states for the purposes of paying response costs—i.e. whether the state agency has to file a claim in writing or whether it can make direct withdrawals without so filing. As amici have demonstrated the question of whether there is a claim for compensation is only an initial inquiry. The claims must also not have been actually paid by Superfund. The internal state mechanism for payment of state costs is of little significance.

Finally, the appellants complain that the Solicitor General's approach "would leave the States free to create special funds of unlimited size and allow them to pursue cleanup wholly outside of the framework of CERCLA." (App. Br., p. 32.) The ability of states to create special funds for response costs is not unique to the Solicitor General's argument but is an integral part of CERCLA. Futhermore, cleanups are not likely to occur outside of the framework of CERCLA since the cost recovery provisions under section 107 are a powerful incentive to ensure that response activities by the states are in conformance with the NCP and therefore in furtherance of CERCLA's goals.

For the above reasons, appellants have failed to rebut the general reasoning of the argument initially advanced by the Solicitor General and expanded by amici.

bursement from Superfund. States may also set up funds to cover all costs of a cleanup in the event that the state, in fact, is not reimbursed by the federal fund. If the federal government does not reimburse the state for its claim—reimbursement is neither guaranteed or automatic—no claim has been paid under CERCLA and the state is free to cover such costs from whatever source. There is also the possibility that the federal government will not complete federal cleanup at a site before moving to another site. The Senators expressly noted that state funds could be used to complete the cleanup efforts at the first site. The state fund could also be used for the ten percent cost share required by CERCLA. Clearly, section 114(c) was drafted to protect a narrow concern and was not designed to impede accomplishment of a principal goal of CERCLA—rapid cleanup of hazardous waste sites.

III

STATE CLEANUP PROGRAMS WHICH ARE FUNDED BY TAXES WHICH ARE NOT DUPLICATIVE OF THE CERCLA TAX ARE NOT PREEMPTED

Assuming, arguendo, that this Court finds that some preemption may be warranted, such a finding should not broadly extend to state programs which are funded by special taxes which are different than the CERCLA tax.

Congress historically has recognized the high degree of specificity it must employ in preempting state taxing programs, conforming the scope of preemption with the specific problem which gave rise to its need. While appellants seek a broad preemption finding, their concern is only with state funds which are supported by taxes on the same products which financed Superfund. They contend that Congress recognized that every cleanup cost or damage claim could be or should be compensated by funds drawn from *special taxes on oil and chemicals* during the first five years of CERCLA that it imposed limitations upon States embodied in Section 114(c). Any preemptive effect of CERCLA should be in keeping, therefore, with the federal purpose sought to be protected.

The principal case asserted by appellants in support of their preemption argument cautions against the overbroad preemption of state taxing schemes. In *Aloha Airlines v. Director of Taxation,* 464 U.S. 7 (1983), this Court permitted preemption only of a particular kind of tax on an industry affecting interstate commerce.

As a general principle, where it is argued that Congress intended to withdraw police power or taxing power from a state by enacting a federal regulatory or taxing scheme, that intention must be explicit. (See *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978).) This is particularly true where federal preemption would upset historic federal-state relationships such as the protection of public health and safety. (See *United States v. Bass,* 404 U.S. 336 (1971).)

As argued by appellants, section 114(c) of CERCLA preserves the Congressional desire to limit the tax that could be imposed on the oil and chemical manufacturing industries so that they would suffer no competitive disadvantage in the international marketplace or cause domestic consumers to pay sharply higher prices. Assuming that to be the case, there is absolutely no indication, explicit or otherwise, that Congress intended to preempt a state tax on the generation of hazardous wastes or any other tax that is not identical in scope to federal Superfund tax. The legislative history is consistent with this position. As noted earlier, Senator Randolph stated that the preemption provision of CERCLA is "a prohibition against double taxation for the same purposes . . ." and that "this preemption provison is narrow in scope and limited to the particular purpose of preventing double taxation" (126 Cong. Rec S 14981 (daily ed. Nov. 24, 1980).) There can be no double taxation in situations where taxing schemes are entirely different and the categories of parties obligated to pay taxes are not the same.

Under CERCLA, the federal Superfund is supported by a tax on petroleum products (see 42 U.S.C. § 4611) and a tax on certain listed chemicals. (See 42 U.S.C. § 4661.) In essence, it is a feed stock tax imposed on manufacturers or producers of these hazardous substances. Many states, in creating their response funds, have devised entirely different taxing mechanisms to support their funds. For example, in the State of California, the Hazardous Substance Account is funded by a tax based upon the disposal of hazardous and extremely hazardous wastes. The tax rate is based upon the total amount in tons of hazardous waste disposed of in a given one-year period. The persons liable for the tax are every person who submitted for disposal offsite, or who disposed of onsite, more than 500 pounds of hazardous waste during the preceding calendar year.[23] Such a taxing system does not reach, as a category of taxpayers, the same persons or the same products covered by CERCLA. Therefore, the State of California system and others like it are not duplicative of the federal Superfund nor can they be characterized as creating "double taxation." The mere fact that some persons, as a result of two wholly different activities, can be subject to both tax systems does not create the double tax problem which Senator Randolph sought to avoid.

Therefore to the extent that this Court finds that any preemption is authorized by CERCLA, it is only those state response funds which impose a taxing mechanism on the same category of persons as CERCLA that should be affected by the Court's decision.

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[23] The following persons are liable for the tax pursuant to California Health and Safety Code Section 25342:

a. persons who dispose of hazardous waste generally;

b. persons who dispose of extremely hazardous waste generally;

c. persons who dispose of hazardous waste into in injection well or landfill;

d. persons who place hazardous or extremely hazardous wastes into surface impoundments;

e. persons who dispose of hazardous or extremely hazardous waste from extraction, beneficiation, and processing of ores and minerals.

CONCLUSION

The decision of the Supreme Court of New Jersey should be affirmed for reasons set forth above.

DATED: September 25, 1985

Respectfully submitted,

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No. 84-978 (11)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EXXON CORPORATION, et al.,
Appellants,

VS.

ROBERT HUNT, ADMINISTRATOR OF
NEW JERSEY SPILL COMPENSATION FUND, et al.,
Appellees.

On Appeal from the Supreme Court of the State of New Jersey

AMICI CURIAE BRIEF OF STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL THE STATES OF CONNECTICUT, OHIO, MAINE, NEW HAMPSHIRE, NEW YORK, TEXAS AND VERMONT

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Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI CURIAE

Over the last decade, the nation has had its attention forcibly drawn to the risks associated with hazardous substances and wastes. Environmental contamination at Love Canal in New York, Times Beach in Missouri, and Stringfellow Acid Pits in California raised many concerns about the extent of toxic contamination in our country. Those concerns have been elevated into fears that the nation is aware of only the tip of the toxics iceberg, and that hazardous waste dangers, like the cancer they can cause, are multiplying at a seemingly uncontrollable rate.

In response, Congress passed the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA).[1] CERCLA created the federal Superfund to control releases of hazardous substances nationwide. Even as CERCLA was enacted, Congress realized that the federal Superfund would be adequate to address only a portion of the most seriously contaminated sites. Congress, therefore, relied upon the states to assume a substantial role in the mitigation of the nation's hazardous substance sites.

As of this writing, the United States' ability to collect taxes to support the federal Superfund will expire on September 30, 1985. Even assuming that Congress reauthorizes a new authority to tax after that date thereby maintaining the viability of Superfund, the states undoubtedly will be required to assume financial responsibility for hazardous substance cleanups. It is critical for this Court

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[1] "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., enacted by Congress on December 11, 1980. "Superfund" is the Hazardous Substance Response Fund established by section 221 of CERCLA, 42 U.S.C. § 9631. "Spill Fund" means the New Jersey Spill Compensation Fund established pursuant to N.J. Stat. Ann. section 58:10-23.11i (West 1982) as part of the New Jersey Spill Compensation and Control Act. N.J. Stat. Ann. Section 58:10-23.11 et. seq. (West 1982) enacted on January 6, 1977 and thereafter amended.

to affirm the ability of the states to raise funds to support those cleanup efforts.

In 1981 the State of California created a state fund to complement and supplement the federal Superfund.[2] This state fund, known as the Hazardous Substance Account (HSA)[3] is generated primarily by a tax on persons who dispose of hazardous waste within the State of California.[4]

As will be explained below, the tax to support the California program is different from the tax used to support both the New Jersey Spill Fund and the federal Superfund, however, the authorized uses of the HSA are similar.[5] HSA, upon appropriation by the State Legislature, may fund administrative costs, hazardous substance response equipment costs, costs of preparation for response to a hazardous substance release, removal and remedial action costs incurred by the State,[6] costs of certain specified studies, and the state share of remedial action costs mandated pursuant to section 104(c)(3) of CERCLA, 42 U.S.C. § 9604(c)(3). Money in HSA may also be appropriated by the

[2] The Hazardous Substance Account Act, California Health and Safety Code sections 25300-25382 (West 1984 & Supp. 1985).

[3] California Health and Safety Code section 25330. This account is administered by the director of the California Department of Health Services.

[4] See generally California Health and Safety Code section 25340-25348. The HSA is funded by a tax imposed annually upon persons who dispose of hazardous and extremely hazardous waste over a specified amount in the state. The tax rate is based upon the total amount in tons of waste disposed of during a one-year period. See California Health and Safety Code section 25347.

[5] See California Health and Safety Code section 25351, which requires that the expenditures from HSA be consistent with section 114(c) of CERCLA, 42 U.S.C. § 9614(c).

[6] The State of California generally adopts the definitions in CERCLA for "remedy or remedial action" (42 U.S.C. § 9601(24)) and "remove or removal" (42 U.S.C. § 9601(23)). See California Health and Safety Code sections 25322, 25323.

state legislature on a site specific basis for the costs of restoring, rehabilitating, or replacing natural resources, and of assessing short-term and long-term injuries to natural resources to the extent such costs are not reimbursed pursuant to CERCLA.[7] Finally, HSA may be used to compensate victims for uninsured out-of-pocket medical expenses and uninsured actual lost wages, business income, or injury to a person's property,[8] compensation provisions which have no equivalent under CERCLA.

On November 6, 1984, the electorate of the State of California passed the Hazardous Substance Cleanup Bond Act of 1984.[9] As a consequence, the state hazardous substance account was increased to fifteen million dollars ($15,000,000) annually with five million dollars ($5,000,000) from the account dedicated to repay in part the principal of, and interest on, the bonds sold under the Hazardous Substance Cleanup Bond Act.

[7] See California Health and Safety Code section 25352.

[8] See generally California Health and Safety Code sections 25370-25382.

[9] That act empowered the sale of general obligation bonds to create a Hazardous Substance Cleanup Fund of up to one hundred million dollars ($100,000,000) to pay (1) the state share of costs of removal and remedial action pursuant to section 104(c)(3) of CERCLA, and (2) all costs of removal or remedial action on sites on the State Priority Ranking List (SPRL). (See California Health and Safety Code Sections 25385-25386.6)

In order to spend HSA funds and/or bond funds for removal or remedial actions at a site, the state must first place this site on the SPRL. (See California Health and Safety Code section 25385.6.) There are currently 222 sites on the SPRL. Of those sites, 53 are also listed or proposed to be listed on the National Priority List. The State of California has executed three cooperative agreements and three contracts with the United States Environmental Protection Agency pursuant to Section 104 of the CERCLA, 42 U.S.C. § 9604 for work on the NPL sites in California.

Other amici joining in this brief administer similar programs for the cleanup of hazardous substance sites.[10] These states are committed to expeditiously cleaning up sites contaminated by hazardous substances to protect the public health and safety of their citizens. A broad ruling in favor of appellants' position could eliminate or deeply erode a state's ability to tax hazardous waste to support its cleanup funds and thereby jeopardize its ability to respond to hazardous substance contamination problems.

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[10] The State of New York also maintains a hazardous waste remedial fund created pursuant to New York State Finance Law, Section 97-b. The Fund is made up of monies collected pursuant to special assessments on generators of hazardous waste and monies collected from penalties against violators of certain sections of the New York State Environmental Conservation Law. To date, New York has identified approximately 1400 hazardous waste sites within the state, only a fraction of which are being addressed by the federal government with Superfund money. The existence of the hazardous waste remedial fund has enabled New York to begin a major program of site investigation and remediation. Without the State fund, New York would not be able to adequately address its hazardous waste problem.

The State of New Hampshire manages the New Hampshire Hazardous Waste Cleanup Fund which was established in 1981. The fund is supported by a fee imposed on industry based upon the amount of hazardous waste generated in the state. (N.H. Rev. Stat. Ann. 147B:8(I) (Supp. 1983).) The fund was established for the broad purpose of providing for the adequate and safe containment of and cleanup of hazardous waste sites in the State of New Hampshire. In 1985, the New Hampshire Legislature restricted the use of the fund to sites which do not qualify for CERCLA funds. (N.H. Rev. Stat. Ann. 147B:6(I) (Supp. 1983) as amended by Chap. 346 of the 1985 N.H. Laws). State matching funds for CERCLA are derived from the sale of a special bond (Chap. 346:4 of the 1985 N.H. laws). No claims payable to third parties out of the Hazardous Waste Cleanup Fund are authorized. (N.H. Rev. Stat. Ann. 147-B:6(II) (Supp. 1983).)

The State of Vermont manages a response fund pursuant to 32 V.Stat. Ann. Chap. 237 "Tax on Hazardous Waste Generation."

SUMMARY OF ARGUMENT

When Congress adopted CERCLA, it set forth a comprehensive scheme designed to guide federal and state responses against the uncontrolled releases of hazardous substances to protect public health and welfare and the environment.

CERCLA established a two-pronged approach for the accelerated cleanup of hazardous substances throughout the nation.

First, CERCLA established a federal fund to be used directly by the United States Environmental Protection Agency (EPA) to take cleanup actions at the most seriously contaminated hazardous substance sites in the nation, and to make other specified payments for claims to the Superfund. The large majority of Superfund expenditures require a specified contribution by a state in order to commence cleanup of a particular site.

Second, CERCLA created liability standards for certain categories of parties responsible for hazardous substance contamination and established a cause of action for recovery of abatement costs from those parties. In so doing, Congress created a powerful mechanism for states and the federal government to rapidly expend public funds to protect the public health and welfare and the environment with the expectation of eventually recovering those costs from responsible parties.

In creating this approach, Congress clearly looked to the states to provide substantial funds to undertake appropriate response actions. State funding is necessary to provide the state share required for federal Superfund expenditures at a specified site. The states also are relied upon to fund response action at sites which may not be addressed with Superfund money. Congress recognized state response funds would be essential to the abatement of hazardous substances because federal Superfund would be inadequate to pay for cleanup at all sites requiring abatement. There is no evidence that Congress desired in any way to limit the ability of states to raise funds for such purposes.

Congress did place a restriction on the use of state funds for other than state response costs. Section 114(c) of CERCLA, 42 U.S.C. § 9614(c) expressly prohibits states from requiring per-

sons to contribute to funds to pay claims for damages or costs of response by third parties or for other compensable items under CERCLA. In creating those categories of limitations, however, Congress intended to preempt state taxation only where the funds raised are to be used to compensate claims already paid for by Superfund. In any event, Congress did not intend to preempt state taxation systems which were not duplicative of the CERCLA system.

We adopt the general reasoning employed by the New Jersey Supreme Court as it enunciated an "actual compensation" test to determine the validity of a state compensation fund. We have recast the court's reasoning, however, in a moderately revised framework.

ARGUMENT
I

THE FORMATION OF STATE CLEANUP FUNDS WAS AN ESSENTIAL ELEMENT OF THE COMPREHENSIVE FEDERAL-STATE SCHEME EMBODIED IN CERCLA

Amici submit that a comprehensive review of CERCLA and its legislative history compels the conclusion that state cleanup funds are permitted and, in fact, are encouraged by the federal legislation.

A. Congress Recognized That States Would Need Their Own Funds To Abate Hazardous Substance Sites

In considering the need for federal legislation to address the problems of improperly managed hazardous waste, Congress observed that:

> "Since enactment of [the Resource Conservation and Recovery Act of 1976], a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as 'the inactive hazardous waste site problem.' The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and Congressional concern over the

> magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem." (H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S. Cong. Ad. News 6120.)

In an effort to address concerns such as those, Congress enacted CERCLA. The legislation established a $1.6 billion Superfund, which is financed primarily by a federal tax on petroleum and specified chemicals. The principal use of the fund is to provide the federal share of public monies for removal[11] or remedial[12] actions directed against releases or threatened releases of hazardous substances to the environment. The remainder of the public monies for remedial measures at a site must be provided by the states in proportions specified by CERCLA. Additionally, Superfund can be used for certain governmental costs and for the payment of two types of claims. (See 42 U.S.C. § 9611.)

As part of the CERCLA legislation, Congress required the amendment of the National Contingency Plan (NCP) created by section 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 to set forth procedures for responding[13] to hazardous substance releases. (See 42 U.S.C. § 9605.) A component of the NCP is the National Priorities List (NPL). (See 42 U.S.C.

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[11] Removal action refers to emergency or crisis measures including "spill containment measures; measures required to warn the public of, and protect it from acute damages; temporary evacuation and housing; [and] activities necessary to close an existing public water supply system." (S.Rep. No. 848, 96th Cong., 2d Sess. 53-54 (1980). *See* 42 U.S.C. § 9601(23).)

[12] Remedial action deals with "those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." (42 U.S.C. § 9601(24).)

[13] See 42 U.S.C. § 9601(25). "Respond" or "response" are generic terms referring to a broad range of actions which mitigate or abate hazardous substance contamination.

§ 9605(8)(B).) The NPL is a list of sites contaminated by hazardous substances which appear to present the most significant threat of harm to human health in the nation. (See 40 C.F.R. § 300.68(a).) Once a site has been placed on the NPL, the federal government may arrange for remedial activities at the site with financing from Superfund. (See 42 U.S.C. § 9604.)

Despite the size of Superfund, Congress was aware that it was inadequate to address every site in the nation requiring cleanup. At the time of CERCLA's passage the EPA, manager of the Superfund, estimated that as many as 30,000 to 50,000 inactive and uncontrolled hazardous waste sites existed in the United States, and estimated that cleanup of the most dangerous sites alone would cost between $13.1 and $22 billion (H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18, 20, (1980), reprinted in 1980 U.S. Cong. Ad. News 6120, 6123). Congress recognized that Superfund would not provide for a sufficient level of funding to handle the cleanup and removal of hazardous waste sites that existed at the time. (See *Exxon v. Hunt*, 481 A.2d 271, 279 (N.J. 1984); see generally 126 Cong. Rec. S/15007 (daily ed. Nov. 24, 1980) remarks of Sen. Stafford; S.Rep. No. 848; 96th Cong., 2d Sess. 17, 71 (1980).) As a consequence, Congress looked to maximize the use of Superfund by requiring supplemental funds from the states for specified actions. In addition, Congress intended to provide enhanced legal authority to the states pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607 to enable them to respond independently to sites which would not be addressed by the limited federal funds. Clearly, in both cases Congress envisioned the creation of state cleanup funds.

1. State Response Funds Are Required For Redmedial Actions Under Section 104 Of CERCLA

State involvement is critical in the initiation of remedial actions under section 104 of CERCLA, 42 U.S.C. § 9604. Section 104(c) of CERCLA prohibits actions unless the state in which the release occurs first enters into a contract or cooperative agreement providing assurances that (1) the state will assure all future maintenance of the removal and remedial action; (2) the state will assure availability of an acceptable hazardous waste

disposal facility, if necessary; and (3) the state will pay either 10 percent of the cost of the remedial action (including all future maintenance) or, in the case of a facility that the state or political subdivision owned at the time of the disposal, at least 50 percent of any sums expended in response to a release at such a facility. (See 47 Fed. Reg. 31186 (1982).) In recognition of the necessity of state contributions for cleanup actions, the states' ability to raise funds for those purposes was intended to be unaffected by the passage of CERCLA. (See 126 Cong. Rec. S14981 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph.))

2. State Response Funds Are Permitted For Response Actions At Sites For Which Federal Funds Cannot Or Have Not Been Used

As encouragement for states to undertake remedial actions with their own funds, CERCLA specifically entitled states to initiate cost recovery actions against specified parties for those expenditures. By authorizing state action for cost recovery and natural resources damages, section 107 of CERCLA provides the states with an essential tool to respond to sites which have not been or may never be addressed with Superfund money. (See *New York v. General Electric Company*, 592 F.Supp. 291 (N.D.N.Y. 1984)

In order to recover response costs under Section 107 of CERCLA, the federal or state response action must not be inconsistent with the NCP. The NCP provides a comprehensive guidance for the identification, investigation and remedy of hazardous substance releases. The NCP is the national blueprint detailing on a flexible basis the methods for achieving the goal of CERCLA which is protection of public health and welfare and the environment. It was through the creation of the NCP, not the creation of Superfund, that Congress intended to impose the comprehensive federal-state scheme alleged by appellants. (*New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985.) If the states followed the NCP then cleanup actions would follow a consistent, nationwide pattern. By providing the cost recovery component in CERCLA, Congress set forth a strong incentive—a carrot rather than

a stick—for the states to implement the cleanup guidelines of the NCP.

The NCP not only provides an overall methodology on how best to clean up sites; it embodies the Congressional reliance on state cleanup actions. Through the NCP, EPA has interpreted CERCLA to provide states with a substantial and oftentimes independent role for undertaking hazardous substance response actions.

As an example of this federal reliance, a major new section of the NCP was added in subpart F (40 C.F.R. §§ 300.61-300.71). This subpart established seven phases of response, from discovery of the release of hazardous substances through various levels of response to documentation of response for cost recovery purposes. The phases are designed to give response personnel a decision-making framework for undertaking response action. (See 47 Fed. Reg. 31198 (1982).) As part of this action, EPA added a new 40 C.F.R. § 300.62 to describe the State role under CERCLA. EPA stated that it "decided to add this section to emphasize the ability of the States to undertake responsibility for much of the response detailed in Subpart F." (47 Fed. Reg. 31199 (1982).)

Furthermore, the NCP specifically provides that:

> "States are encouraged to use State authorities to compel potentially responsible parties to undertake response actions, or to *themselves undertake response actions which are not eligible for Federal funding.*" (Emphasis added.) (40 C.F.R. section 300.24(c).)

The court should afford great weight to an agency's interpretation of its governing statute. Within the past year, this Court twice has applied this fundamental maxim of statutory construction in upholding interpretations by EPA of federal environmental statutes. See *Chemical Manufacturer's Association v. National Resources Defense Council,* ____ U.S. ____, 105 S.Ct. 1102 (1985), *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* ____ U.S. ____, 104 S.Ct. 2778 (1984).[14]

[14] While reviewing a challenge to EPA's position regarding the granting of variances from pollution discharge requirement established under the federal Clean Water Act (33 U.S.C. § 1251 et seq.) this Court in *Chemical Manufacturers Assoc.* stated:

> "This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this 'very complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." [105 S.Ct. at 1108.]

The ability of the states to pursue a cost recovery action under 107(a)(4)(A) of CERCLA is separate and independent of the requirements of any other CERCLA sections, including section 104. (See *United States v. Northeastern Pharmaceutical & Chemical Company,* 579 F.Supp. 823 (W.D. Mo. 1984); *United States v. Reilly Tar & Chemical Company,* 546 F.Supp. 1100, 1118 (D. Minn. 1982).) CERCLA, therefore, authorizes state actions to recover costs even where such costs were not incurred as part of a contract or cooperative agreement pursuant to section 104 of CERCLA.

By requiring national guidelines for response actions and providing clear legal authority to the states to recover the costs of their response actions, Congress envisioned the broad use of State-created response funds. The use of such funds may be independent of federal funds, without EPA supervision and at sites not on the National Priorities List and still be consistent with the aims of Congress. (See *New York v. Shore Realty,* 759 F.2d 1032, 1046-1047 (2d. Cir. 1985); *New York v. General Electric,* 592 F.Supp. 291, 303-304 (N.D.N.Y. 1984).)

B. Exxon Fundamentally Misunderstands The Federal-State Relationship Contemplated by CERCLA

While appellants recognize that CERCLA envisions a coordinated federal-state scheme to address hazardous substance problems, they misapprehend the full nature of the response scheme. They unduly restrict their focus to the creation of the Superfund and the means by which it is spent in conjunction with matching state contributions. In doing so, appellants erroneously imply that states can only spend response funds on National

Priority List sites and even then only in the context of section 104 of CERCLA. This is patently incorrect.[15]

Nothing in CERCLA supports appellants' contention that states cannot clean up sites on the NPL entirely with state funds if they so desire. States can certainly refuse to enter into cooperative agreements or contracts with EPA as called for by section 104 of CERCLA. In such a situation, EPA would be unable to proceed with a remedial action. Whether a site on the NPL

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[15] Appellants' confusion over the purposes of CERCLA is evident in their discussion of the role of state funds to pursue cleanup (App. Br. at 20, 21). On the one hand they state that:

> "[i]f states were permitted to create their own special funds for the purpose of financing cleanup at Superfund-eligible sites within the State, they would circumvent the coordinated State-federal procedure and priorities of CERCLA—for example, by relying upon their own funds to pursue cleanup through their own unsupervised procedures and refusing to enter into the cooperative agreements with EPA required by Sections 104(c) and (d) as a precondition to governmental action under Section 104."

On the other hand they state that "Congress did not prohibit the States from using general revenues . . . to create such funds for cleanup." Thus, according to appellants, Congress intended to preclude independent state actions—to require coordinated federal-state procedure—but only in instances involving "special" state funds, not in cases involving "general" funds. The alleged problems described in their first statement regarding State-controlled funds are cured by their second statement. If their first statement were correct, the source of the funds would be irrelevant since it is States' ability to have their own cleanup funds which is the perceived problem.

Furthermore, appellants' contend that if states were limited to general revenues to finance their own cleanup efforts they would have a greater incentive to "participate in CERCLA" and to coordinate their actions with the federal government. While it is unclear what appellants mean by "participate in CERCLA" it makes no sense that the source of state cleanup funds should affect the State's desire to enter into cooperative agreements or contracts pursuant to section 104 of CERCLA. The fact that section 104 provides for federal funding of up to 90% of specified remedial costs on NPL sites acts as a powerful incentive for states to work with EPA at sites eligible for federal funding irrespective of the source of state funds for the state share.

becomes the subject of a publicly-financed remedial action is largely dependent on whether the state, not EPA, can contribute the necessary remedial share and provide other specified assurances. The New Jersey Supreme Court correctly noted that the underlying scheme of Superfund is one that "allows, but does not require, cooperation of the federal and state regimes." (*Exxon v. Hunt,* 481 A.2d at 280, citing the Tax Court, 4 N.J. Tax at 315.)

The United States Court of Appeals, Second Circuit also has observed that:

> "Congress did not intend listing on the NPL to be a prerequisite to all response actions. Neither the earlier House nor Senate version included the NPL [National Priorities List] in the NCP [National Contingency Plan] [citations omitted]; although the Senate version limited joint federal-state responses to sites on the NPL [citations omitted]. It is also instructive to note that the Senate Report described the NPL as serving 'primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant *remedial actions*.' (emphasis added). In reviewing the changes made by the compromise, no one mentioned that NPL listing would be a requirement for removal action or even a general requirement under the NCP." (*New York v. Shore Realty Corp.,* 759 F.2d 1032, 1047 (2d Cir. 1985.)

Appellants further contend that any site on the NPL can be cleaned up with public funds only if federal Superfund money is spent on the site and that to the extent that state funds are required to initiate a remedial action at the site, those funds can only be from general revenue sources. This position ignores Congress' recognition that a federal Superfund would not be able to address all sites that require remedial action nor even address the limited number of sites designated on the National Priorities List.

Appellants argue that the states are barred by CERCLA from having any special state funds whose purpose is to clean up "Superfund-eligible" sites. Nowhere in its brief, however, has appellant attempted to articulate what a Superfund-eligible site is.

Appellant has avoided definition because to do so would highlight the fallacies of its argument.

Assuming arguendo that such a definition is possible, a "Superfund-eligible" site could refer to any site which is, or may be on the NPL. The first NPL was proposed by EPA on December 30, 1982 (see 47 Fed. Reg. 58476 (1982)), over two years after the passage of CERCLA. The first final NPL was issued as a rule in September 1983 and included 406 sites (see 48 Fed. Reg. 40658 (1983)). The NPL is required to be revised at least once annually. At present 538 sites are on the list and 248 additional sites are proposed for inclusion. It is estimated that, on the basis of its current criteria, between 1,400 and 2,200 sites will ultimately be added to the NPL.[16] Any site in the United States which has suffered a release of hazardous substances to the environment has the potential to be added to the NPL. If all such sites are "Superfund-eligible," then no state could create funds to respond to those releases.

Even if actual listing on the NPL is the criteria for "superfund-eligibility," there are problems in application that Congress could not have intended. First, the delay in promulgating the NPL would have prevented any site action for almost three years. Second, the NPL is a dynamic document and will undoubtedly include new sites. How will a state know whether a site which is currently not on the NPL eventually be included? Under the theory advanced by appellants the jeopardy to a state-financed cleanup is obvious. A state could be using its funds to address a site not on the NPL at the time and, therefore, not eligible for federal funding. As soon as the site was included on the list, the state would be required to cease using its own funds on the site until it entered into a cooperative agreement or contract with EPA pursuant to section 104 of CERCLA. EPA, however, while listing the site on the NPL, may not have any federal funds currently available to devote to the site. Thus, ironically, where some work could have taken place on the site, it would now be

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[16] Letter to James Florio from United States General Accounting Office, *Status of EPA's Remedial Cleanup Efforts,* March 20, 1985.

barred. In short, the goal of CERCLA—that the health and welfare be protected—would be stymied.

Because the logical outcome of appellant's theory contravenes the primary goal of CERCLA it should be rejected in total. State cleanup funds were not barred by CERCLA; they were, in fact, counted upon to address hazardous substance problems that could not or would not be remedied with federal monies.

II

CERCLA DOES NOT PREEMPT STATE FUNDS WHICH ARE USED FOR RESPONSE ACTIONS

Appellants erroneously argue that section 114(c) of CERCLA, 42 U.S.C. § 9614(c) preempts special State funds which finance any cleanup costs or damages which are eligible for, though never actually compensated by, federal Superfund. Appellants err because they ignore the plain language of section 114(c) and its legislative history which provides for State funding of a broad range of activities including response actions at sites both on and off the NPL.

A. Only Those State Funds Which Pay "Claims For Compensation" Are Subject to the Section 114(c) Test For Preemption

1. The Plain Language of Section 114(c) Prohibits Only A Limited Class Of State Activities

As required by the general principles of statutory construction and federal preemption, the starting point for interpreting a statute is with the words of the statute itself. (See *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 107, 108, (1980).) Section 114(c) states in pertinent part:

> "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter."

On its face, section 114(c) expressly prohibits two categories of uses for which state funds could not be used.[17] The first is "to pay compensation for claims of any costs of response or damages." The second is to pay compensation for ". . . claims which may be compensated under this subchapter."

There is a definite limitation on the reach of this prohibition. The term "compensation for claims" has a narrowing effect so that many state uses of its own funds are not affected. The preemption set forth in section 114(c) is for a very limited category of state activities.

The term "claim" is defined in Superfund as a "demand in writing for a sum certain" (42 U.S.C. § 9601 (4)). The term "compensation" is not defined by the statute but is customarily used to mean "indemnification; . . . making whole; giving an equivalent or substitute of equal value[;] [t]hat which is necessary to restore an injured party to his former position." *Black's Law Dictionary* 256 (5th Ed. 1979); see also *Webster's Third New International Dictionary* 463 (1976). The terms "claim" and "compensation" as used in Superfund are related; Superfund defines a "claimant" as any person who presents a *claim* for *compensation* under this chapter. (42 U.S.C. § 9601(5) (emphasis added).)

Elsewhere in CERCLA, Congress drew a distinction between "compensation for claims" and other types of government expenditures for removal or remedial action. In section 111(a) of

[17] The Solicitor General of the United States submitted an amicus curiae brief which addressed whether this Court should note probable jurisdiction. In that brief, the Solicitor General took a different position from either of the parties or the New Jersey Supreme Court. He argued that there was a preemptive purpose to section 114(c) but that it was limited to "claims for compensation" only. Under his analysis the payment by a State fund of cleanup expenses incurred by the state is permissible under section 114(c) since it is not "compensation" for a "claim" as those terms are used in CERCLA. The Solicitor General declined to adopt the "actual compensation test" articulated by the New Jersey Supreme Court. Our initial argument borrows heavily from the Solicitor General's brief.

CERCLA, 42 U.S.C. § 9611(a), there are four specified uses of Superfund. Two of the permitted uses of Superfund money are described as the "payment" of "claim[s]." (Sections 111(a)(2) and (3), 42 U.S.C. §§ 9611(a)(2) and (3).) Both involve written demands either for damages or reimbursement for monies spent in response (Sections 111(a)(2) and (3), 42 U.S.C. §§ 9611(a)(2) and (3)). The other two permitted uses of Superfund money involve expenditures made without such a written demand for damages or reimbursement. (Sections 111(a)(1), (4), 42 U.S.C. §§ 9611(a)(1) and (4).) These are *"payment of governmental response costs"* (Section 111(a)(1), 42 U.S.C. § 9611(a)(1)—*i.e., payments made for the cleanup or removal of hazardous substances or for remedial action—and payments for necessary studies, investigations, equipment, and employee health* (Section 111(a)(4), 42 U.S.C. §§ 9611(a)(4).)

"Claims," therefore, has an express and definite meaning within CERCLA. The term does not have a general, imprecise use nor is it synonymous with costs incurred for a cleanup or response actions undertaken by a federal or state entity.

2. The Legislative History is Consistent With The Plain Language of the Statute

Section 114(c) was inserted as a floor amendment during the waning hours of the Congressional session. As a consequence, there are no committee reports or other legislative documents to demonstrate conclusively the intended use of the provision. The chronological development of the legislative proposals that eventually became CERCLA have been exhaustively detailed by the appellants and appellees.[18] All parties, including the New Jersey Supreme court, have identified as particularly significant the

[18] CERCLA was the product of last-minute compromise between competing House (*H.R. 85,* 96th Cong., 1st Sess. (1979), 126 Cong. Rec. H9, 186-201 (daily ed. Sept. 19, 1980) and *H.R. 7020,* 96th Cong., 2d Sess. (1980), 126 Cong. Rec. H9, 437-48 daily ed. Sept. 23, 1980) and Senate (*S. 1480,* 96th Cong., 1st Sess. (1979), 126 Cong. Rec. S14, 938-48 (daily ed. Nov. 24, 1980)) bills, and carried virtually no direct legislative history.

colloquy between Senator Bradley of New Jersey and Senator Randolph, Chairman of the Environment and Public Works Committee, which preceded the enactment of the bill that became Superfund. (See 126 Cong. Rec. S 14941-15008 (daily ed. Nov. 24, 1980).) The parties recognize that because Senator Randolph was chairman of the committee which reported the Superfund bill to the Senate, as well as floor manager and cosponsor of the measure, his explanations and commentws with respect to the interpretation of Superfund provisions deserve particular deference. (*Exxon v. Hunt,* 481 A.2d 271, 277 (N.J. 1984); see also *Mastro Plastics Corp. v. National Labor Relations Board,* 350 U.S. 290 (1956); *National Woodwork Manufacturers Assoc. v. National Labor Relations Board* 386 U.S. 612, 740 (1957); *Federal Energy Administration v. Algonquin SNG, Inc.* 426 U.S. 548, 564-567 (1976).)

The discussion between Senator Bradley of New Jersey, who was concerned about the survival of the very state fund addressed in this case, and Senator Randolph provides a strong demonstration that the reach of the preemption clause was intended to be limited to "compensation for claims" as is in the phrase's customary, literal sense. The Senators' discussion was as follows:

> "MR. BRADLEY: * * * Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund *for the purpose of reimbursing claims already provided for in this legislation?*
>
> "MR. RANDOLPH: Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay *damage compensable under this bill.*
>
> "MR. BRADLEY: *However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.*
>
> "MR. RANDOLPH: The Senator is correct.
>
> "MR. BRADLEY: There is nothing in the language or intent of this bill which would prohibit a State from *responding to a release* either under agreement with the Secretary, at the direction of the Federal on-scene coordinator or in the absence of timely response by any other party. In fact, the Federal Government's cleanup and containment capability is viewed as something of an appeal of last resort in the absence of any other adequate and timely response, if my understanding is correct.
>
> "MR. RANDOLPH: Yes, the Senator understands the intent of the bill correctly. * * *" (Emphasis added; 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980)

After S. 1480 was passed by the Senate and its language was substituted for that in the House bill (H.R. 7020, 96th Cong., 1st Sess. (1979), Representative Florio, the sponsor of the House bill, observed:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create duplicate funds *to pay damages compensable under this bill, there is no preemption of the States's ability to collect taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.* It is also intended that State funds can be used to provide the required 10-percent State match." (1 Library of Congress, Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510,* at 780 (Comm. Print 1983).)

Given this history as well as the plain meaning of the terms we must concur with the Solicitor General that section 114(c) preempts, as a general matter, only a category of payments made in response to formal demands in writing upon a state fund by parties seeking to be made whole for damages or costs or other actions compensable under CERCLA for the release of a hazardous substance.

B. State Funds Which Pay "Compensation For Claims" Are Preempted Only If Federal Superfund Has Actually Paid Compensation For The Same Claim

Thus far, amici have generally adopted the argument of the Solicitor General as to the scope of 114(c) preemption provision. The Solicitor General takes the position that funds used by the states to pay "compensation for claims" which are damages or costs attributable to the release of a hazardous substance or other use which may be compensated, are preempted. The Solicitor General requires no further inquiry into the type of damage or cost which a state fund seeks to reimburse as a claim. The Solicitor General finds that one of the two uses of the New Jersey Spill Fund—the payment of other parties' damages and cleanup costs—constitutes the payment of "compensation for claims" within the meaning of section 114(c) of Superfund.[19]

At this point, amici must depart from the Solicitor General's position. While we believe that section 114(c) clearly preempts, as a category, "compensation for claims" the language is less clear as to the extent of the preemption. The legislative history indicates that Congress intended to prohibit use of funds to pay claims for compensation only to the extent that such claims were already paid for by Superfund. Therefore, we agree with the reasoning of the New Jersey Supreme Court that state funds are not preempted by section 114(c) insofar as the state funds compensate claims that are either not covered or not actually paid under Superfund. Review of the applicable law and relevant legislative history of CERCLA supports this view.

In addressing the question of whether federal law confers a power that is not exercisable by states—the payment of compensation for specified claims—the Supremacy Clause (U.S. Const., art. VI, cl. 2) requires a judicial determination of whether application of state legislation frustrates the full effectiveness of federal law. (See *Perez v. Campbell*, 402 U.S. 637, 657 (1971).) As recently stated in pending hazardous waste litigation:

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[19] We agree with the Solicitor General's observation that the only "damages" which may be affected by section 114(c) are "natural resource damages."

> "Thus, analysis must proceed in two stages: first, an examination of the primary purposes of each of the laws at issue; second, a determination whether state law is an obstacle to the effectuation of federal objectives." (*Matter of Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984), cert. granted, 53 U.S.L. Week 3584 (Feb. 19, 1985).)

Furthermore, as noted by the New Jersey Supreme Court, "it is not a question of 'whether purposes of the two laws are parallel or divergent,' but 'whether both regulations can be enforced without impairing the federal superintendence of the field . . . ' [citation omitted]" (*Exxon v. Hunt*, 481 A.2d 271, 275 (N.J. 1984). Where it argued, as it is in this case, that Congress intended to withdraw a power from a state by enacting a federal scheme, that intention must be explicit. (*Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 272 (3d Cir. 1984).)

In this case, the Congressional intention to prevent the states from using their own funds to pay any compensation for certain specified claims is not explicit.

As described earlier in this brief, the colloquy between Senators Bradley and Randolph demonstrated that section 114(c) was intended to have very limited preemptive effect on existing and future state funds. Furthermore, the discussion also demonstrated that state funds could be used for purposes including the payment of "compensation for claims" that were either not covered or not actually paid under Superfund.

> "MR. RANDOLPH: * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid under the provisions of this bill.
>
> * * * * *
>
> "Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a State may make of its money, nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the

purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

"In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

"* * * * *

"MR. BRADLEY: And am I also correct in noting that State funds are preempted *only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?*

"MR. RANDOLPH: That is correct."

(Emphasis added; 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980).)

Senator Randolph's statements, which addressed funds created subsequent to the passage of CERCLA[20] and would enable states to tax to compensate claims not actually compensated under Superfund, comports with a prohibition against double taxation in that states are still prevented from taxing to pay for claims actually financed by the federal government.[21]

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[20] Appellants' suggestion that the reference point for this critical dialogue between Senators Randolph and Bradley were state funds in existence prior to CERCLA is unsupportable. They had finished their discussion of existing funds and were focused on newly financed funds. Furthermore, Senator Bradley would not have noted that "State funds are preempted only for efforts which are in fact paid for by the Federal fund" if he were referring to an existing fund. Such funds would have already received their contributions prior to CERCLA and no tax conflict could have arisen.

[21] Recent comments of the House of Representatives Committee on Energy and Commerce confirm the above conclusion. Its report dated July 16, 1984, addressed the CERCLA's relationship to other law and the then pending bill's (H.R. 5640) repeal of the preemption provision:

> *"The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to*

If Congress had intended section 114(c) to perform the broad preemptive purpose alleged by appellants it would have explicitly drafted that section to do so. For example, Congress could have made section 114(c) read as follows:

> "Except as provided in this chapter, no person may be required to contribute to any fund the purpose of which is to pay for any costs of response or damages or costs which may be compensated under this subchapter."

The insertion of the "compensation for claims" language in section 114(c) was a conscious choice by Congress to ensure that preemption be narrow in scope and not unduly restrict the states' capability to fund response actions.

C. State Funds Used For Any Purpose Not Specified in Section 114(c) Including State Response Costs, Are Not Preempted

Expenditures by states for any purposes other than those expressly restricted by section 114(c) are not preempted.[22] There-

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> *funds which would pay costs or damages that would be actually compensated by Superfund.* To avoid any possible misinterpretation of the law which could further restrict the states' efforts to raise the funds necessary to meet their matching share obligation under the program, the legislation repeals the current law's preemption provision in its entirety. [H.R. Rep. No. 890, Part 1, 98th Cong., 2d Sess. 58-59 (1984) (emphasis added).]" See also S. Rep. 99-11, 99th Cong., 1st Sess. 59-60 (1985).
>
> Congress is clearly attempting to clarify its intent in enacting this statute and such attempts should be accorded due consideration.

[22] Appellants arguments against the suggestion that section 114(c) preempts only state funds used to pay third party claims for costs or damages or any other compensable items is unsupported by legislative history or a plain reading of section 114(c).

The first argument apparently assumes that if states can be claimants under CERCLA, they cannot maintain their own special funds. On its face, this argument is unworkable. It is unimportant whether the state can assert a claim against Superfund for specified costs of response taken by the state or damages suffered by the state, and still maintain its own fund to pay third party claims against the state fund. There is no nexus between the payment of the state claim by Superfund and the payment of the third party claim by the state. Senator Randolph

fore, states may establish funds to be used for a broad range of response actions whether undertaken in cooperation with the federal government pursuant to section 104 or alone.

The legislative history reveals a number of additional purposes for which a state can collect taxes for funds to be used when the costs are not compensable under Superfund. (See 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980) (remarks of Sen. Bradley and Sen. Randolph).) States can use their funds to provide an initial response to a hazardous waste release and thereafter seek reim-

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recognized that and characterized it as "a question of bookkeeping rather than a subject or preemption."

The second argument relies upon section 114(b)'s prohibition against double recovery. Nothing however in the Solicitor General's position supports the possibility of a double recovery,

The third argument is that under the New Jersey system, the New Jersey Department of Environmental Protection is compelled by state law to present claims for compensation to an independent state official who is the administrator of the New Jersey spill fund. Appellants suggest that the Solicitor General's argument is tenuous because Congress could not have intended the preemptive effect of Section 114(c) to rely upon the administrative mechanisms adopted by the states for the purposes of paying response costs—i.e. whether the state agency has to file a claim in writing or whether it can make direct withdrawals without so filing. As amici have demonstrated the question of whether there is a claim for compensation is only an initial inquiry. The claims must also not have been actually paid by Superfund. The internal state mechanism for payment of state costs is of little significance.

Finally, the appellants complain that the Solicitor General's approach "would leave the States free to create special funds of unlimited size and allow them to pursue cleanup wholly outside of the framework of CERCLA." (App. Br., p. 32.) The ability of states to create special funds for response costs is not unique to the Solicitor General's argument but is an integral part of CERCLA. Futhermore, cleanups are not likely to occur outside of the framework of CERCLA since the cost recovery provisions under section 107 are a powerful incentive to ensure that response activities by the states are in conformance with the NCP and therefore in furtherance of CERCLA's goals.

For the above reasons, appellants have failed to rebut the general reasoning of the argument initially advanced by the Solicitor General and expanded by amici.

bursement from Superfund. States may also set up funds to cover all costs of a cleanup in the event that the state, in fact, is not reimbursed by the federal fund. If the federal government does not reimburse the state for its claim—reimbursement is neither guaranteed or automatic—no claim has been paid under CERCLA and the state is free to cover such costs from whatever source. There is also the possibility that the federal government will not complete federal cleanup at a site before moving to another site. The Senators expressly noted that state funds could be used to complete the cleanup efforts at the first site. The state fund could also be used for the ten percent cost share required by CERCLA. Clearly, section 114(c) was drafted to protect a narrow concern and was not designed to impede accomplishment of a principal goal of CERCLA—rapid cleanup of hazardous waste sites.

III

STATE CLEANUP PROGRAMS WHICH ARE FUNDED BY TAXES WHICH ARE NOT DUPLICATIVE OF THE CERCLA TAX ARE NOT PREEMPTED

Assuming, arguendo, that this Court finds that some preemption may be warranted, such a finding should not broadly extend to state programs which are funded by special taxes which are different than the CERCLA tax.

Congress historically has recognized the high degree of specificity it must employ in preempting state taxing programs, conforming the scope of preemption with the specific problem which gave rise to its need. While appellants seek a broad preemption finding, their concern is only with state funds which are supported by taxes on the same products which financed Superfund. They contend that Congress recognized that every cleanup cost or damage claim could be or should be compensated by funds drawn from *special taxes on oil and chemicals* during the first five years of CERCLA that it imposed limitations upon States embodied in Section 114(c). Any preemptive effect of CERCLA should be in keeping, therefore, with the federal purpose sought to be protected.

The principal case asserted by appellants in support of their preemption argument cautions against the overbroad preemption of state taxing schemes. In *Aloha Airlines v. Director of Taxation,* 464 U.S. 7 (1983), this Court permitted preemption only of a particular kind of tax on an industry affecting interstate commerce.

As a general principle, where it is argued that Congress intended to withdraw police power or taxing power from a state by enacting a federal regulatory or taxing scheme, that intention must be explicit. (See *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978).) This is particularly true where federal preemption would upset historic federal-state relationships such as the protection of public health and safety. (See *United States v. Bass,* 404 U.S. 336 (1971).)

As argued by appellants, section 114(c) of CERCLA preserves the Congressional desire to limit the tax that could be imposed on the oil and chemical manufacturing industries so that they would suffer no competitive disadvantage in the international marketplace or cause domestic consumers to pay sharply higher prices. Assuming that to be the case, there is absolutely no indication, explicit or otherwise, that Congress intended to preempt a state tax on the generation of hazardous wastes or any other tax that is not identical in scope to federal Superfund tax. The legislative history is consistent with this position. As noted earlier, Senator Randolph stated that the preemption provision of CERCLA is "a prohibition against double taxation for the same purposes . . ." and that "this preemption provison is narrow in scope and limited to the particular purpose of preventing double taxation" (126 Cong. Rec S 14981 (daily ed. Nov. 24, 1980).) There can be no double taxation in situations where taxing schemes are entirely different and the categories of parties obligated to pay taxes are not the same.

Under CERCLA, the federal Superfund is supported by a tax on petroleum products (see 42 U.S.C. § 4611) and a tax on certain listed chemicals. (See 42 U.S.C. § 4661.) In essence, it is a feed stock tax imposed on manufacturers or producers of these hazardous substances. Many states, in creating their response funds, have devised entirely different taxing mechanisms to support their funds. For example, in the State of California, the Hazardous Substance Account is funded by a tax based upon the disposal of hazardous and extremely hazardous wastes. The tax rate is based upon the total amount in tons of hazardous waste disposed of in a given one-year period. The persons liable for the tax are every person who submitted for disposal offsite, or who disposed of onsite, more than 500 pounds of hazardous waste during the preceding calendar year.[23] Such a taxing system does not reach, as a category of taxpayers, the same persons or the same products covered by CERCLA. Therefore, the State of California system and others like it are not duplicative of the federal Superfund nor can they be characterized as creating "double taxation." The mere fact that some persons, as a result of two wholly different activities, can be subject to both tax systems does not create the double tax problem which Senator Randolph sought to avoid.

Therefore to the extent that this Court finds that any preemption is authorized by CERCLA, it is only those state response funds which impose a taxing mechanism on the same category of persons as CERCLA that should be affected by the Court's decision.

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[23] The following persons are liable for the tax pursuant to California Health and Safety Code Section 25342:

a. persons who dispose of hazardous waste generally;

b. persons who dispose of extremely hazardous waste generally;

c. persons who dispose of hazardous waste into in injection well or landfill;

d. persons who place hazardous or extremely hazardous wastes into surface impoundments;

e. persons who dispose of hazardous or extremely hazardous waste from extraction, beneficiation, and processing of ores and minerals.

CONCLUSION

The decision of the Supreme Court of New Jersey should be affirmed for reasons set forth above.

DATED: September 25, 1985

Respectfully submitted,

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